INTRODUCTION

TO

ROMAN LAW

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BY THE LATE

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NEW EDITION

REVISED AND ENLARGED

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EDITOR'S NOTE.

In the present revision I have endeavoured to confine myself within lines that I have reason to believe the author would have approved. Maintaining the framework of the book, I have corrected some obvious mistakes that still remained in the preceding edition, and I have added a considerable number of points of detail that may be useful to students, assisting without embarrassing the exposition of legal principles. Distinctive views of the author, not clearly untenable, I have left as they stood.

It has been considered unnecessary to continue the supplementary Glossary appended to some previous editions. And the Index has been dispensed with in view of the fulness of the Contents.

2 Garden Court, Temple.
March, 1921.

PREFACE TO FOURTH EDITION.

This book is intended to serve as an introduction to the study of Roman Law, and to give adequate information to those who require a mere elementary knowledge of the subject. On the points of leading importance a comparison is instituted between the English and Roman Law.

The matter of this book is to a large extent the same as the Institutes of Justinian, but with two exceptions. I have omitted many particulars that were useful to the persons for whom the Institutes were written but are of little value to a student of modern law. On the other hand—especially in the Law of Property and Contract—the glaring deficiencies of the Institutes are largely supplemented. The object that has been kept in view is to put the student in possession of such information and legal principles as will enable him to acquire a more intelligent comprehension of modern law.

The arrangement follows the order of the Roman Institutional writers. They arranged law in three groups—(1) law concerning persons; (2) law concerning things; and (3) law concerning actions. Practically they sub-divided 'things' into—(1) property; (2) obligation; (3) inheritance. 'Inheritance' is discussed in the Institutes after 'property,' and before 'obligation'; but it is more convenient to take it after 'obligation.'

As the present work is intended to serve as a companion to the Institutes of Justinian, the arrangement of Justinian has been, with that exception, substantially followed.

* * * *

2 Brick Court, Temple,
November, 1887.

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INTRODUCTION

TO

ROMAN LAW

CHAPTER I.

HISTORY OF ROMAN LAW.

Historical value of Roman Law.

THE Roman Law presents two aspects, each deserving the attention of the student of Jurisprudence. It furnishes the basis of much of the law of Europe, and has long proved an almost inexhaustible storehouse of legal principles. In the history of legal conceptions, again, it occupies a position of unique value. It forms a connecting link between the institutions of our Aryan forefathers and the complex organisation of modern society. Its ancient records carry us back to the dawn of civil jurisdiction, and, as we trace its course for more than a thousand years, there is exhibited a panorama of legal development such as cannot be matched in the history of the laws of any other people.

The Priest and the Jurisconsult.

At a relatively early stage the Romans made a great advance as compared with some other ancient peoples: they separated law from religious rites and moral rules. The code of Hammurabi, indeed, by more than a thousand years the oldest of known codes, is occupied exclusively with civil law; but the laws ascribed to Manu and to Moses have not emerged from the confusion of legal and religious conceptions. Though there are not wanting indications of the influence of religious conceptions on Roman Law, yet at an early stage the practical Roman mind had drawn a clear line between the office of the priest and the office of the jurisconsult. On the establishment of the Republic it was not possible for the consuls, owing to the technical character of the law, to dispense with the assistance of the College of Pontiffs. The institution of the censorship, however, in B.C. 443, marked definitively the separation of morals from law, and may not have been without practical influence on the relations of religion and law in the legal work of the Pontiffs. The formal severance of the Pontiffs from the legal administration did not take place till shortly after the middle of the fifth century of the City (B.C. 289); while their influence on the law continued to be felt down to the time of Cicero. Yet the release of the law from the direct influence of the Pontiffs—influence inevitable and most valuable in its

time — and the freer operation of popular influences, and especially the opening of a legal career to persons outside the privileged corporation of Pontiffs, proved a most important development. To this reform may be ascribed in no slight degree the relatively early and rapid progress of the legal institutions of Rome.

Law of Nature.

The Roman genius was essentially practical; to the speculative or theoretical side of Jurisprudence it made no contribution; indeed, such was its poverty in this respect that it was constrained to import from Greece elementary notions in respect to the foundations of law. The Stoics said the whole duty of man was summed up in one sentence—to act according to nature. By nature they meant a somewhat vague notion of the universe as governed by law, on the moral as well as on the physical side. In looking for such a law, men sought what was common or universal, and not what was peculiar to different communities. It happened that in Rome, when the Stoic philosophy was first introduced (about the middle of the second century before Christ), the distinction between the law peculiar to Roman citizens (*ius ciuile*) and the law in general use among other peoples (*ius gentium*) was sharply accentuated. The jurists seized the notion of a law of nature and proceeded to identify it with the *ius gentium*, so that the two phrases become convertible, with but one excep-

tion: the Stoic morality affirmed that slavery could not be attributed to Nature, although it was unquestionably a part of the *ius gentium*. The law of nature appears in the legal writings of the Romans as a sort of intellectual garnish, which had no real connection with the Roman Law. It is an idea that explains nothing and illuminates nothing.

Leges regiae.

The Roman writers were in the habit of ascribing to the Kings such fragments of apparently very ancient law as they found in their researches. A number of these fragments have been collected from various authors by the diligence of modern inquirers. The compilation known as *Ius Ciuile Papirianum*, consisting mainly of religious rules, is attributed by Pomponius (a great jurist of the time of Hadrianus: D. 1. 2. 2. 2.) to Sextus Papirius, who is said to have lived in the time of the last King, Tarquinius Superbus; but it is now assigned to a date not earlier than the third century before Christ. We have no authentic documents of the law from the period of the Kings.

Ius Ciuile Papirianum.

XII Tables.

After a prolonged agitation, a commission of ten (*Decemuiri*) was appointed in place of consuls for the year B.C. 451, charged specially to draw up laws (*legibus scribendis*); and they drew up ten "Tables." The commission was reconstituted for next year, and added two Tables. If it be true that a delegation of three members had been

despatched to Greece (or to Magna Graecia) to obtain suggestions, especially from the legislation of Solon, there remain but very scanty and doubtful traces of Greek law in the fragments that have come down to us. The XII Tables, as we possess them, have been pieced together from passages gathered from the remaining literature, especially from the writings of jurisconsults and grammarians, the order being determined by various indications. The law they contain is usually considered to be the *customary* law of the time, though some scholars maintain that it was the *existing* law generally, and others hold that they were framed with the view of giving a system of law really consonant with the nominally achieved Republican constitution. If new laws were to be accepted from Greek States, and if (as Pomponius says) the Decemvirs received full power not only to interpret but also to amend the laws (*datumque est iis ius eo anno in ciuitate summum uti leges et corrigerent, si opus esset, et interpretarentur*), it seems rather unlikely that they restricted themselves to a mere codification of existing customs. Cicero calls the XII Tables "legum fontes et capita," and says that down to his time they were learned as lessons in the schools. Recent attempts to bring down their date a century and a-half, and even two centuries and a-half, have been strongly resisted.

Though the XII Tables undoubtedly consist

of law mainly, if not absolutely, of indigenous growth, yet they do not give us the oldest law of Rome. Three centuries intervene between the reputed founding of the city and the XII Tables. During this period, perhaps even earlier, the fundamental institutions of Rome were already undergoing a process of decay. The autonomy of the family, and the absolute authority of its head, were, in the middle of the fifth century before Christ, already shaken. The XII Tables contain provisions enabling a wife or a child to escape from that domestic thraldom upon which society in ancient Rome was based.

Ancient conservatism.

One of the most striking features of ancient society is the extreme tenacity with which it adheres to its usages. In some cases the immobility of ancient law may be ascribed to the religious sanction with which it was clothed. The laws are attributed to some divine being, from whose statutes and ordinances it were impiety to depart. But, even when laws are attributed to a mere human legislator, there is still a profound dread of change. The attitude of primitive man towards the customs he has been taught to observe is the counterpart of his timidity in the presence of nature. Man is timid where a being of less intelligence would be calm, because he perceives countless possibilities of suffering and calamity from the movement of the forces of nature, while yet his experience is too narrow to

enable him to tell where evil will arise, and how it may be prevented. Thus, in a backward state of society, any change in the law is both feared and disliked. But in a progressive community an expansion and growth of law is essential. How that is to be accomplished is the problem of vital interest.

Agencies of Development.

The agencies whereby the Roman law was developed—whereby the scanty rules of the early age of the Republic grew into the *Corpus Iuris Ciuilis* as it was left by Justinian—were three in number: Interpretation by the jurisconsults, Equity by the Praetor, and Legislation. In these three agencies there may be remarked a progressive openness in effecting changes in the law.

Interpretation.

The interpretation of the Pontiffs, if of wide scope, had but narrow publicity; and the later jurisconsults, while ostensibly they did not "make," but only "interpreted," the law, yet in numerous cases by their process of interpretation extracted out of the XII Tables a good deal that was never in them. The fact is that "interpretation" meant not merely the explanation of the contents of the law but also the adaptation of the law to the changing circumstances of the times.

Equity.

The Praetor, in succession to the Pontiffs, obtained the right to supplement, to develop, and even to amend the law, but his power was admitted within circumscribed, although somewhat indefinite, limits.

Legislation.

Legislation, involving the

direct and open change of law on account of its unfitness, is the last to reach maturity. Under the Empire, this came to supersede both the other modes. It is worthy of remark that England affords a somewhat parallel case of development. Customary law, as exhibited in decided cases, Equity, and Legislation have appeared in the same order and fulfilled similar functions in England and in Rome.

Interpretation: The Jurisconsults.

Jurisconsults.

The College of Pontiffs was the repository of the law: the Pontiffs were the lawyers. Pomponius, in his brief account of the history of Roman Law, informs us that the custody of the XII Tables, the exclusive knowledge of the forms of procedure (*legis actiones*), and the right of interpreting the law, belonged to the College of Pontiffs. He goes on to say that this continued for a century and a-half after the publication of the XII Tables, until Gnaeus Flavius, a clerk of Appius Claudius, who had written down the forms of actions, abstracted his master's book and published it (B.C. 304). This publication was known as the *Ius Flavianum*. It was received with very great satisfaction by the people; and the effect of this disclosure of a specially important part of the technical legal knowledge of the Pontiffs may be connected with the admission of plebeians to the College of Pontiffs (B.C. 300),

Ius Flavianum.

and with the formal severance of the College from the practical administration of the law (B.C. 289). Tiberius Coruncanius (consul, B.C. 280) was the first plebeian Pontifex Maximus (B.C. 252), and is said to have been the first to profess publicly to give information on law. The first writer of an important law book seems to have been Sextus Aelius (consul, B.C. 198). His work was entitled *Tripertita*, as consisting of three parts: the text of the XII Tables, and under each clause the interpretation of it and the form of procedure under it (*legis actio*). Half a century later Pomponius places three jurists (Publius Mucius, Brutus, and Manilius) whose writings were of such original importance that he says *fundauerunt ius ciuile*. Q. Mucius Scaevola (son of Publius Mucius; consul, B.C. 95, and Pontifex Maximus) was the first to digest the results of interpretation into a comprehensive and methodical system (*ius ciuile primus constituit*). C. Aquilius Gallus (colleague of Cicero in the praetorship, B.C. 66) was a pupil of Scaevola; and Servius Sulpicius Rufus (*ut aetatis suae doctissimus*), whose writings exercised a long-abiding influence, was a pupil of Aquilius: both are mentioned in the Institutes of Justinian.

Writings of Jurisconsults.

During the Republic it was entirely voluntary for a magistrate to receive, or for anyone to give, advice on law. Nevertheless the

Responsa Prudentium.

Praetor and the *iudices* naturally welcomed such assistance as it was in the power of the jūrisconsults to offer. But Augustus made a very important change: he introduced the principle of investing certain jurisconsults with the power to advise with the Emperor's authority (*ex auctoritate eius, publice* or *populo, respondere*). The first of these official, "licensed," or "patented" jurisconsults was Massurius Sabinus, who would seem to have been appointed by Tiberius when he was "Cæsar" (A.D. 4-14). This *ius respondendi* appears to have been conferred very sparingly. But the imperial licence naturally extended to the writings of the jurisconsults, and hence an extraordinary impetus was given to the production of legal literature: the activity that followed during the first two and a-half centuries of the Christian era evolved the rich store of juridical reasoning that constitutes the permanent value of the mature Roman Law.

Law of Citations.

The system begun under Augustus had one drawback. Jurisconsults might give different opinions, and how was the person hearing a cause to determine which was right? So marked became the divisions among jurisconsults that soon two rival schools grew up (called respectively Sabinians and Proculeians), giving conflicting opinions on a considerable number of points of law. It was thus in the power of a Praetor or a *iudex* in many cases to determine

his judgment, either for plaintiff or for defendant, according as he chose to follow the Sabinians or the Proculeians. Gaius refers to a partial remedy introduced by Hadrianus (A.D. 117-138): where the licensed jurists were unanimous, their opinion had the force of statute (*legis vicem optinet*), and the *index* was bound to follow it; but, if they were not unanimous, he was left, as before, to follow which opinion he chose. At a later period (A.D. 426) Valentinianus enacted a law, commonly called "The Law of Citations," providing that the writings of only five jurists, Papinianus, Paulus, Gaius (who had never possessed the *ius respondendi*), Ulpianus, and Modestinus, including their citations from earlier jurists (these to be verified by collation of manuscripts), should be quoted as authorities. If a majority of these held one opinion, that was to bind the judge; if they were equally divided, the opinion of the illustrious Papinianus was to be adopted.

Importance of Jurisconsults.

From the manner in which the jurisconsults modified the law, it is extremely difficult to specify the changes that ought to be ascribed to them. By extensive and restrictive interpretation, by revision of earlier interpretations, and even by suggestions contrary to the terms of the existing law, they laboured to bring the older law into closer correspondence with the changing needs of their time. They supplemented the laws

by numberless new doctrines. The Digest illustrates on every page how they cast the law into general statements or rules of remarkable precision and clearness (*iura condere, leges conscribere*). The more eminent jurisconsults, as members of the Emperor's Privy Council, contributed materially to the shaping of Imperial legislation. The great bulk of Roman Law, and all that is most valuable in it, is due to the jurisconsults: a glance at the Collections of Statutes and Constitutions shows how little relatively was the amount contributed by direct legislation.

Equity: The Praetor.

The Praetor Urbanus.

When the consulship was thrown open to plebeians by the Licinian laws of B.C. 367, the administration of justice was separated from the office and retained in the hands of the patricians. The new administrator was elected under the same auspices and had the same *imperium* (except in military command) as the consuls, and he was called by the name that the consuls originally bore—the Praetor. His special function was to administer justice in the City (*qui ius in urbe diceret*), and hence he was designated Praetor Urbanus. Until the formal withdrawal of the Pontiffs from the legal administration, the Praetor, like the consuls before him, had the legal assistance of a member of the

College, who may have even continued for some time to sit on the bench; and, even after the Pontiffs were confined to their purely religious duties, and the Praetor was invested with all the legal powers they had exercised, he no doubt had frequently to resort to their expert knowledge for advice.

The Praetor Peregrinus.

It was not long till a second Praetor was needed. In the absence of the consuls in the field, the Praetor had to take over their work in Rome; the number of foreigners at Rome was increasing; and there was no magistrate left to deal with law cases outside Rome. The date of appointment of a second Praetor usually ranges from B.C. 247 to 242; yet strong reasons are advanced for placing it as early as B.C. 321. The *second Praetor is said to be the Praetor qui inter cives et peregrinos ius dicit*: the abbreviated form "praetor peregrinus" is not found till the time of the Empire. Pomponius says "*plerumque inter peregrinos.*" The second Praetor, indeed, originally was not confined to cases between citizens and aliens, or between aliens alone, but relieved the Urban Praetor in the legal jurisdiction of the consuls outside Rome over citizens and aliens alike, and took such cases, civil and criminal, within Rome as the Urban Praetor was unable to attend to. When the consuls returned from the wars, and the Urban Praetor returned to his own proper work, the second Praetor, while

still assisting the Urban Praetor at need, would no doubt find his chief employment in dealing with cases where one or both parties were aliens.

Praetor's Edict.

The Praetor administered the law: he disclaimed making law. Yet his powers of interpretation and amendment had a qualified or limited legislative effect. With him all legal proceedings commenced. By him the questions at issue between the parties were put into shape for investigation and decision by the *iudex*. In a progressive community, where the wants of the people continually tended to go beyond the provisions of the law, it was inevitable that the Praetor should exercise on the growth of Roman Law an immediate influence far more powerful, as it was more direct and authoritative, than the influence of the jurisconsults. Being an officer invested with the *imperium*, he issued at the time of his taking office a Proclamation or Edict stating the rules by which he would guide himself in granting or refusing legal remedies. This Proclamation was called *Edictum Perpetuum*, as running on through the Praetor's year of office, and in contrast to temporary or occasional Proclamations, which were known as *Edicta Repentina*. Naturally each successive Praetor was content in the main to follow in the footsteps of his predecessors, and the portion of their Edict that he transferred to his own was called

Edictum translaticium or *tralaticium*; and so the Edict became "perpetuum" as running on through the terms of successive Praetors. Until B.C. 67 there was no guarantee, except constitutional usage, that a Praetor would adhere during his term of office to the rules laid down in his own proclamation; but in that year a statute (*lex Cornelia de Edictis*) was passed, declaring it illegal for a Praetor to depart from his Edict. The growth of this *Edictum Perpetuum* continued vigorously for a century and a-half after the Empire was established. Under Hadrianus (A.D. 125-128), the great jurist Salvius Iulianus revised it and consolidated it (possibly with the edicts of the *praetores peregrini* and of the provincial governors); then it was confirmed as law by a senatusconsultum, which further provided that, in case the Edict contained no remedy for a particular grievance, the principles of it should be followed in finding one. The Edict was now "perpetual" in the sense of being permanently fixed. This work of Iulianus may be taken to mark the end of Praetorian legal reform.

Jurisdiction of Praetor.

The Praetor stands midway between the jurisconsults and the Legislature. His right to supplement and to amend the law was statutory, but practically it was not unlimited. He was girt round by a firm, although invisible, and somewhat elastic, band. He may be viewed as

the keeper of the conscience of the Roman people, as the person who was to determine in what cases the strict law was to give way to natural justice (*naturalis aequitas*). But even a wider authority than this was ascribed to him, for he was allowed to entertain general considerations of utility (*publica utilitas*). A single example, however, may suffice to show that the Praetor's edict was confined within real, although indefinable, limits. The XII Tables gave the succession to a father's estate to his children under his *potestas*; the children released from the *potestas* did not succeed. The Praetor, however, did not scruple to admit emancipated children to succeed to their fathers; but it was reserved for later legislation to provide that a child should succeed to its mother.

Results of Praetorian action.

The chief results of the work of the Praetor may be summed up under three heads. It was the Praetor chiefly that admitted aliens within the pale of Roman Law. To him mainly is due the change by which the Formalism of Roman Law was superseded by well-conceived rules giving effect to the real intentions of parties. And he took the first and most active share in transforming the law of intestate succession, so that, for the purpose of inheritance, the family came to be based on the natural tie of blood instead of the artificial relation of *potestas*.

LEGISLATION.

To give a full account of Roman legislation would be to write the constitutional history of Rome: suffice it here to mark a few distinctions that are of importance in looking at the historical development of Roman Law.

Legislation.

During the Republic, the Popular Assembly was the fountain of legislation;[1] during the earlier history of the Empire, the place of the Popular Assembly was gradually taken by the Senate, acting as the mouthpiece of the Emperor; finally, even this form was dropped, and all enactments flowed directly from the Emperor.

Republican Assemblies.

During the Republic three Assemblies of the Roman people existed. The oldest was the *Comitia Curiata*. In the regal period this

[1] A statute (*lex*) is what the Roman people (*populus*), when asked by a senatorial magistrate—a Consul for instance—ordered.

A decree of the commons (*plebiscitum*) is what the commons (*plebs*), when asked by a magistrate of the commons—a Tribune for instance—ordered. The commons (*plebs*) differ from the people (*populus*), as species does from kind (genus); for the name "people" means the whole of the citizens, reckoning the patricians and senators as well, while the name "commons" means the rest of the citizens without the patricians and senators.

A *Senatus Consultum* (decree of the Senate) is what the Senate orders and settles. After the Roman people grew so big that it was difficult to bring them together on one spot in order to ratify a law, it seemed reasonable that the Senate should be consulted instead of the people.

assembly consisted of the *populus Romanus* in its thirty curies (or family groups): it could meet only by summons of the King; it merely accepted or rejected the proposals submitted by him, without the right of discussion or of amendment; nor was any decision by it valid without the authorisation of the Senate. Under the Republic it rapidly fell into the background, though it formally existed, represented by thirty lictors, down into Imperial times: for the private law its main importance lay in its meetings under pontifical presidency to deal with matters of religious significance, such as adoptions and wills. The *Comitia Centuriata*, said to have been originated by the sixth King, Servius Tullius, included the whole Roman people arranged in classes according to their wealth, so as to give the preponderating power to the richest. During the regal period it was a military organisation on the basis of property: under the Republic it became a legislative body, ousting the *Comitia Curiata*. The *Comitia Tributa* was the assembly of the whole Roman people in their tribes—a regional classification. The pressure of plebeian agitation had led to the creation of tribunes of the *plebs* (B.C. 494) for the protection of individual citizens from oppression, with the right to hold meetings in curiae on questions of plebeian interest, the resolutions (*plebiscita*) binding the plebeians only, and only so far as

they did not conflict with the existing law; and in B.C. 471 the organisation of these meetings was changed from curiate to tribal. In B.C. 449, the *Lex Valeria Horatia* enacted that the resolutions of the *Comitia Tributa* should bind the whole people, patricians as well as plebeians; apparently, however, with the addition or implication that they should first be confirmed by the *Comitia Centuriata* and (like the enactments of the *Comitia Centuriata*) by the consent of the Senate. The first restriction was removed by a *Lex Publilia* of B.C. 339, and the second by the *Lex Hortensia* of B.C. 287. Henceforth, then, *plebiscita* had precisely the same force as *populisgita*, and they are very often called by the same name *leges* (*e.g.*, *Lex Aquilia*). The legislation of these assemblies, however, was directed mainly to matters other than private law.

Senatus-consulta.

The Senate was properly an advisory and administrative, not a legislative, body. Its influence on the legislation of the *Comitia Centuriata* before the *Lex Publilia*, and on the *Comitia Tributa* before the *Lex Hortensia*, appears to have been restrictive rather than positive; and in later Republican times, though probably only for the most part in emergencies, and especially after Sulla, it occasionally dispensed with the observance of existing laws, an encroachment on the powers of the *Comitia* for which it usually sought indemnity. Occasionally,

too, it would invite a tribune or a praetor to introduce a reform that it judged desirable. Its authority to *make* law was steadily disputed by the *Populares* (from the time of the Gracchi). Under Sulla it was vested with the initiative in legislation; but its legislative activity is of little or no account till the Empire, when it became prolific mainly from the reign of Claudius (A.D. 41) to the reign of Septimius Seuerus (A.D. 193—211). The *senatusconsulta* were essentially Imperial laws under a thin Republican disguise.

Imperial legislation.

The sovereign power in law-making was exercised by the Emperors in three ways: (1) by direct legislation (*edicta*), (2) by judgments in their capacity as the Supreme Tribunal (*decreta*), and (3) by *epistolae* or *rescripta*, giving advice on questions of law in answer to inferior judges (from provincial governors downwards) and to private inquirers. Imperial legislative acts of all kinds are included under the general name of *constitutiones*. The Emperor's authority to make law was conferred on him by statute (*lex regia, quae de imperio eius lata est*) at the beginning of each reign. The law by which Vespasianus was invested with supreme power was discovered at Rome in the 14th century; and it confirms the statement of Gaius and Justinian that the legal foundation of the Emperor's power was a statute.

Codification.

Collections of records of the law were made at different times. The Twelve Tables are often loosely designated a Code. The Praetor's Edict, though seldom designated a "codex," nevertheless suggested the arrangement of subsequent codes. Julius Cæsar is said to have formed a project for codifying the law, but it was frustrated by his death. The first collection of Imperial statutes (of the Diui Fratres, Marcus Aurelius, and Commodus: A.D. 161—193) was made in twenty books by the jurist Papirius Iustus towards the end of the second century. The *Codex Gregorianus*, which contained constitutions probably from Hadrianus (though its earliest authentic constitution dates A.D. 196) down to A.D. 295, was compiled under Diocletianus. The *Codex Hermogenianus* was probably a supplement to the *Codex Gregorianus*: its constitutions date from 291 to 365. The first edition appeared between 314 and 324; the last probably in 365. Only about 100 constitutions of these two Codes have come down to us; yet they no doubt furnished the Code of Justinian with the constitutions earlier than Constantine. The *Codex Theodosianus* was promulgated in 438 by Theodosius II. in the East Empire and in 439 by Valentinianus III. in the Western Empire. It contained the constitutions from the time of

Earlier Codes.

Constantine onwards, disposed in sixteen books divided into titles, the constitutions being given in chronological order in each title. It is estimated that some 450 constitutions of the first five books are lost. The Code was intended to cover "the whole field of law, private and public, civil and criminal, fiscal and municipal, military and ecclesiastical." The private law is treated in Books II. to V.

Justinian's Codification.

The reign of Justinian marks the culminating period of Roman Law. By a very remarkable series of enactments, Justinian accomplished a marvellous work of consolidation and amendment in cutting away anomalies and giving completeness and symmetry to the body of the law. The chief minister in these reforms was Tribonianus, Quaestor of the Palace, who died A.D. 545. Justinian was scarcely seated on the throne when he began the work that has given him such renown. On the 15th Feb. 528, he appointed a commission of ten members to draw up a Code of the existing constitutions. In little more than a year (7th April 529) the work was done. A second edition (*Codex repetitae praelectionis*) was issued on Nov. 16, 534. The first edition, called *Codex Vetus*, has been entirely lost. The Code that we have is the second edition.

Pandects.

On the 15th Dec. 530, a commission of sixteen members with Tribonianus at their head was appointed for a new task—nothing less than to

bring within a moderate compass and to arrange in order the vast accumulation of law that had grown up under the hands of Jurisconsults and Praetors. The commission proceeded to deal with the works of some forty jurists, consisting of nearly 2,000 books, and more than 3,000,000 lines. In the course of only three years this pile of material was sifted and reduced to about one-twentieth of its original bulk. The scraps or fragments of the jurists were placed under titles, and these were collected in fifty divisions or books. The titles are arranged in the order of the topics of the *Edictum Perpetuum* as it was shaped by Salvius Iulianus. The arrangement of the fragments under the titles seems to have been mechanical. The commission divided the writings of the jurists into three classes, and assigned each class to a separate sub-committee. The first class, called Sabinian, embraced all the systematic treatises on the *ius ciuile*; the second, called Edictal, consisted of commentaries on the edicts of the Praetor and the Aediles; the third, called Papinian, was formed of the writings of Papinianus and the record of cases. Each sub-committee arranged its collections independently, and when they came together to arrange the titles, they took for the first group that which had the most numerous, and for the last that which had the least numerous, fragments. Such at least is the conclusion that has been drawn

Bluhme's discovery.

with much ingenuity by a German jurist (Bluhme) from the distribution of the fragments. The finished work was called *Digesta* or *Pandectae*, and on the 30th Dec. 533 it obtained the force of law.

Institutes. In the beginning of 533, a new commission was appointed of law-professors and advocates to prepare an elementary or preparatory text-book. The commission adopted the Institutes of Gaius as a groundwork, and the Institutes of Justinian are little more than a new edition of Gaius, with such omissions and additions as were necessitated by the lapse of more than three and a-half centuries. The Institutes of Gaius were recovered in 1816 by Niebuhr. Of Gaius himself hardly anything is known. Even his name is lost, Gaius being merely a praenomen. Notwithstanding the *lacunae* that still exist, his work is valuable in reference to the antiquities of Roman Law.

In the preparation of the Digest, many controverted points of the old law turned up, some of which were referred to Justinian for decision. The decisions upon them, fifty in number, appear to have been collected separately, and called the *Quinquaginta Decisiones*. They were incorporated in the second edition of the Code.

Novels. Justinian found his zeal for law reform by no means stifled by these great works, and some

of the most important enactments, especially relating to intestate succession, were published afterwards. These subsequent laws are called *Novellæ*.

For the present purpose it is not necessary to go beyond the legislation of Justinian. But it is not to be forgotten that a government continuously descended from that of ancient Rome was carried on at Constantinople, and that the Roman Law was observed and taught and practised there, down to 1453, when that city was captured and held by the Turks; that the Roman Law passed with the Roman arms over the whole of western and southern Europe, and, with colonists of Latin race, to the continent of America; and that even at the present day it lies at the foundation of the law in most of the European nations.[1]

[1] For the bearings on English law, see "The Influence of the Roman Law on the Law of England," by Lord Justice Scrutton (Yorke Prize Essay, Cambridge, 1884).

CHAPTER II.

THE LAW OF PERSONS.

Sect. 1.—Slaves and Freedmen.

General Character of Ancient Slavery.

The institution of slavery is ancient and world-wide, but it varied greatly in character and oppressiveness. In the simple life of primitive communities, East and West alike, the slave was practically an inferior servant: there was no reason, except the cruel spirit of a master, why he should be treated otherwise. The practice approximated the later Stoic view as expressed by Chrysippus, that the slave is a labourer hired for life (*perpetuus mercennarius*). But the growth of commercial interests, the increase of luxury, and the stress of life, tended to mar the humaner relations of a less strenuous time; and, though many masters and their stewards might be personally not unkind, yet even the commercial interest in a slave needed to be reinforced by a strong public sense of humanity. The indulgence shown to the slave by Hindoo law and in Egyptian practice contrasts strikingly with the harsh theory and practice of the Roman people.

Yet Roman slavery, at its worst, was a humane institution compared with the slavery of some countries in mediæval and even in modern times. In Rome the difference between master and slave was not embittered by prejudices of race or of colour. Slaves were largely of the same race as their masters—not seldom well educated, and filling posts of a high and confidential nature. Slavery was regarded as an accident or misfortune that might befall any man, not as the natural and indelible condition of an inferior race.

Legal position of Slave.

Ancient law makes little difference between sons, wives, and slaves; and in the olden times, when Rome consisted of a small colony of peasant proprietors, few of whom would be rich enough to possess slaves, slavery was a domestic institution, and the slave, in no trivial sense, a member of the family. The children, the wife, and the slaves of a Roman head of a house (*paterfamilias*) were equally subject to his unrestricted power (*uitæ necisque potestas*), and equally outside the jurisdiction of the State. If any of them did wrong, not they, but the head of their house, had to answer for it in the Courts of the State. In compensation for this liability, he had the power to surrender the offending person in satisfaction to the complainant (*noxalis deditio*).

Amelioration of Slavery.

The rise of the imperial power in Rome and the spread of luxury and demoralisation were

largely counterbalanced in favour of the slave by the extended knowledge and practice of Stoic ethical doctrines, which actuated all the great lawyers from the early part of the last century of the Republic and inspired the legislation of the Antonines. Before the end of the Republic, a statute (*Lex Cornelia*, B.C. 81) was passed, making it murder for a person other than the owner to kill a slave, but it was reserved for the Emperor Claudius (A.D. 41—54) to make the crime equally murder when it was committed by the master. Antoninus Pius signalised his reign by a law providing that masters that ill-used their slaves should be forced to sell them; it was even, he said, for the interest of masters themselves that relief should not be denied to the victims of cruelty, or starvation, or unbearable ill-usage. But, although thus protected from ill-treatment, slaves were not entitled to the privilege of family life or to rights of property. A union between a male and a female slave (*contubernium*) was not a marriage; but the offspring, if they afterwards acquired their freedom, were recognised by the law as related in blood. The philosopher Seneca, one of the advisers of Nero, had expressed the view that in public auctions of slaves brother ought not to be separated from brother; and Constantine enacted the humane principle of keeping together children and parents, brothers and brothers, wives and hus-

bands. Under the title of *peculium*, a slave, with his master's permission, might have the enjoyment of property. Whatever a slave might have as *peculium*, whether the savings from exceptional industry, or gifts as a reward of extraordinary services, was protected by custom and public opinion, although not by law. This protection seems to have sufficed, for the cases were not rare in which the slave was able to buy his freedom out of the accumulations of his *peculium*. *Peculium.*

Persons were sometimes made slaves as a punishment for crimes or for civil wrongs; but some of these cases had become obsolete before Justinian, some were abolished by him, and only two were left by him—the case where a freedman showed ingratitude to his patron, and the case where a freeman over twenty years of age fraudulently allowed himself to be sold in order to share the price. But the two chief sources of the supply of slaves were capture in war, and birth. According to the barbarous law of war in ancient times, every prisoner of war was made a slave.* This was justified on the ground that Captives in War.

* A Roman captured by the enemy was considered by the Roman Law to be lawfully a slave. But if he effected his escape, and returned to his own country, he was placed, according to the fiction of *postliminium*, as far as possible, in the same position as if he had never been captured. If a *paterfamilias*, he recovered the

it was an improvement upon the still more ancient practice of putting all prisoners of war to death. Again, slavery was hereditary. The children of a female slave were the slaves of her master. It was immaterial whether the father was free or a slave. But though hereditary, slavery was not indelible. Slaves might be manumitted by their masters, and admitted as citizens of Rome.

Slavery by Birth.

Formal Manumission.

During the Republic, manumission was a formal act (*publica, sollemnis, legitima, iusta*), having the twofold effect of releasing a slave from servitude and enrolling him among the citizens. It required the concurrence of the master and of a magistrate as representing the State. The inscription of the slave's name, by his master's direction, on the roll of citizens by the Censor at the quinquennial census was a mode that ceased early in the Empire, practically with the cessation of the censorship as a separate magistrature (B.C. 22). It presupposed the freedom of the slave, and gave validity to the expressed will of the master. But the principal modes were two—one by which the slave was freed in the lifetime of the master, the other whereby freedom was bequeathed as a legacy. The

potestas over his family, and the episode of slavery was for the purposes of law obliterated. The doctrine of *postliminium* was also applied to property taken by an enemy, when recovered

first was called manumission *uindictâ*, a fictitious suit (*causa liberalis*), in which a person (*adsertor libertatis*) claimed that the slave was freeborn by laying on him a rod (*uindicta* or *festuca*), the symbol of ownership. The master did not dispute the claim, the magistrate made a decree establishing the freedom of the slave, and then the master touched the slave with the rod, and, turning him round three times, let him go. The formalities were gradually curtailed; and in the time of Gaius manumission could take place, not only in court, but wherever the magistrate happened to be. Originally testaments were made in the Comitia Calata, probably by the authorisation of the people in the usual form of legislation. In this case the consent of the master and the authority of the people combined to enable a testator to confer freedom and citizenship on his slave. This privilege was continued when the testament was not made in the Comitia, but became a private act. A fourth formal mode appears in an enactment of Constantine (A.D. 316) as already in use—manumission in church (*in sacrosanctis ecclesiis*). The master declared to the bishop in presence of the congregation his desire that the slave should be free.

Non-formal Manumission.

At first no other mode of manumission than these three Republican modes was allowed. The clearest expression of a master's intention to liberate his slave had no effect unless it was

clothed with the proper legal formalities. This led to inconvenient results. If there were a flaw in the manumission, or if the manumission were non-formal, a master might respect his own intention and allow his slave to live in freedom, but his heir, standing on the strict technicality of law, might reclaim him into slavery. At some time not precisely known the Praetor interfered to protect the liberated slave in the enjoyment of his personal freedom, although not of his property. In A.D. 19 (if not earlier) the *Lex Iunia Norbana* declared that persons so imperfectly manumitted should enjoy some further rights—the same as *Latini coloniarii*. They were henceforth called *Latini Iuniani*. They were free, but not full citizens: they were allowed a limited *commercium*; they could neither make a valid Roman will nor take under such a will; nor could they be appointed guardians by will. They might, however, eventually attain full citizenship, by various forms of public service. If the slave had before manumission been put in chains as a punishment, or otherwise dealt with as a debased person, the *Lex Aelia Sentia* (A.D. 4) provided that when manumitted he should be subject to the disabilities of *peregrini dediticii* (foreigners that had fought against the Romans and had surrendered), and be incapable of ever becoming a citizen. Before the time of Justinian, however, this portion of the Lex Aelia Sentia had fallen

Latini Iuniani.

Dediticii.

into disuse, and the name of Latins was rarely heard. Justinian formally abolished both Latini Iuniani and Dediticii, and enacted that whenever a master desired to give freedom to his slave, whether the old forms were observed or not, the slave should become a citizen as well as free.

In the time of Justinian a master was not restricted in the number of slaves he might manumit, unless, as had been provided by the Lex Aelia Sentia, he released them with both the intention and the effect of defrauding his creditors. The other provisions of the same statute requiring a master to be twenty and the slave thirty years of age, unless for special reasons manumission was allowed by the Board of Manumission, were repealed by him; and he allowed a man to dispose of his slaves (as of his other property) *by will*, first at the age of seventeen, and afterwards at the age of fourteen. The *Lex Fufia Caninia* (A.D. 8), which prohibited a master from manumitting by will (though not from manumitting in any other manner) more than a certain proportion of his slaves, was also swept away by Justinian (A.D. 528).

Restraints on Manumission.

If the manumission was correct in form, but the master had been induced by *fraud* or compelled by *force* to manumit the slave, the slave retained his freedom; but the master had an action for damages. A non-formal manumission procured by fraud or by force was void.

Limitations and Distinctions.

The master must be both Quiritarian and Bonitarian

owner of the slave: that is, he must be *dominus ex iure Quiritium* and have him *in bonis* (see below, p. 58). The merely Quiritarian owner's right was purely technical; it was the Bonitarian owner that had the *potestas* over the slave, and therefore when this conflict of ownership occurred it was he alone that could manumit the slave: and thereupon the manumitted slave became, not a citizen, but a *Latinus*.

In like manner, where a master has given a slave of his to another person by way of usufruct (see below, p. 75), and then manumitted him, the slave becomes, not a free man, but a *seruus sine domino*. The master has only the bare right of ownership (*nuda proprietas*), and by the manumission simply divests himself of his technical ownership, without freeing the slave. Neither, of course, can the usufructuary give the slave his freedom.

Where a slave belonging to two masters jointly was manumitted by one of them, the manumissor's share in the slave passed to the other master; where such a manumission was non-formal, the prevailing opinion of the classical jurists was that the act was null. But Justinian enacted that the slave should be free and that the other master should be compensated.

A testator that freed his slave by his will *directly*—e.g., *Stichus seruus meus liber esto*—must be Quiritarian (and Bonitarian) owner both at the date of the will and at the time of his death. The slave became *libertus Orcinus*—the freedman of a man that had gone to Orcus (the world of the dead). Where a testator freed a slave (his own or another's) by will *indirectly*—e.g., requested his heir to set free that slave—the slave became the freedman, not of the testator, but of the person that actually manumitted him.

A slave manumitted in his master's will under a *condition* or under a *time* limitation became free only on fulfilment of the condition or at the date specified. He was a *statuliber*—a slave with contingent freedom.

Manumission did not wholly break the bond that united the slave to his master. The relation of master and slave was replaced by the relation between patron (*patronus*) and freedman (*libertus*). The freedman could not sue his patron without first obtaining the consent of the Praetor. The freedman, if he had the means, was bound to support his patron if he fell into poverty. If the freedman had no children of his own, he was bound to leave a portion of his property to his patron; and if he died without a will and without children, his patron inherited all his estate. Besides, it was usual, as the price of the slave's freedom, that the master should stipulate for a certain amount of work from the freedman. Generally, the freedman worked so many hours in each day. If the patron did not find him food and clothes, he must allow him sufficient time to procure a maintenance for himself. The kind of work was the same as the freedman had been accustomed to as a slave, or any trade he might afterwards learn. Patron's Rights.

SECT. II.—PARENT AND CHILD.

The powers enjoyed by the head of a household in Rome over his children (*patria potestas*) are scarcely, if we look to the earlier period of the Republic, distinguishable from the rights he exercised over a slave. The paterfamilias had, to use the language of the old law, the power of life Powers of Paterfamilias.

and death (*ius uitæ necisque*). While his father lived, a son, however mature his age, and however high his official position, could neither hold property nor marry without his father's consent. But the father could not interfere with his son in the sphere of his public duties; indeed, the father might be under the son's jurisdiction. In early times the father could sell his children; and a provision of the XII Tables, declaring the paternal power to be forfeited if the father sold his son thrice, was turned by the ingenuity of the jurisconsults into a means of emancipation. While the Republic lasted, the paternal power was restrained only by public opinion; but under the Empire, it was curbed by the stronger hand of the law.

A law attributed to Romulus forbad the exposure of any male infant or of a firstborn female infant, unless such children were, in the opinion of five neighbours, unfit to be reared. There are half-a-dozen specific historical cases of the exercise of the extreme power of killing sons; but in the later Republic the Stoic doctrine began to impose its influence.

Under Traianus a father guilty of gross cruelty to his son was compelled to emancipate him. Under Hadrianus, a father that killed his son under the severest provocation was banished. Ulpianus lays it down that a father may not kill his son, but must bring his case into court; and about the same time the Emperor Alexander (A.D. 227) treated the father's powers as no more than a simple flogging, unless with judicial concurrence. Constantine enacted (A.D. 318) that if a father slew his son he should suffer the death of a parricide, that is, be tied up in a

sack with a viper, a cock, and an ape, and be thrown into water and drowned. A statute of A.D. 374 made the exposure of infants a crime.

Considerable progress also was made under the Empire in conferring upon children under the father's power partial rights of property. Thus a son was allowed to keep as his separate property whatever he acquired as a soldier (*peculium castrense*); and this privilege, under the name of *peculium quasi-castrense*, was extended by Constantine (A.D. 320) and by succeeding Emperors to officials of the civil service in respect of their salaries, and eventually to the incomes of the clergy. Finally, Justinian enacted that the father should take only a life interest in respect of every acquisition of a child, except what the child obtained through using his father's property (*peculium profecticium*). The interest of the child in such acquisitions was called *peculium adventicium*. **Separate Property of Children.**

The Roman family, in the eye of the law, was based on the paternal power. It formed an *imperium in imperio* older than the State. The Roman's house was, in the strictest sense, his castle. The officers of the State did not dare to cross his threshold, and assumed no power to interfere within his doors. The head of the family was its sole representative; he alone had a *locus standi* in the tribunals of the State. If a wrong was done by or to any member of the **Constitution of Roman Family.**

family, he and not they must answer for it, or demand compensation; if property gained by them were appropriated by another, he, and not they, could reclaim it; if a contract was made with one of them, he alone could sue upon it. The family lived under one roof, had one purse, one altar and one worship. It was this common life and jurisdiction that constituted in the eyes of the early Roman the very essence of the family. A daughter marrying and entering into another household, and thus becoming subject to a different authority, was no longer regarded (for legal purposes) as a member of the family in which she was born. Her children likewise were strangers to her father's hearth, and not legally of kin to those that continued under his roof. Again, sons released from their father's power by emancipation ceased to be members of his family. On the other hand, grandchildren descended from sons unemancipated were in the power of their grandfather, while he lived, and fell on his death under the power of their own father. Even strangers by birth could become members of the family by adoption, and the law originally recognised no difference between them and the offspring of the head of the house.

Acquisition of *potestas*.

The paternal power was acquired—(1) by birth, (2) by legitimation, and (3) by adoption. The offspring of a legal marriage were in the power

of their father. To this union only citizens could be parties; if either party was not a citizen, the union was recognised as a marriage for many purposes, but not for giving the *patria potestas* to the father. From time to time multifarious public services were admitted as grounds for the advance of Latini Iuniani to the full citizenship, and thus to the rights contained in the *patria potestas*; and elaborate rules were applied for the rectification of such mistakes about the status of either party to a marriage as prevented the husband from enjoying the *patria potestas* over his children. Caracalla (A.D. 212) extended Roman citizenship to all the free subjects of Rome, and accordingly, in the later Roman law, questions as to citizenship rarely arose. Constantine introduced *legitimatio per subsequens matrimonium*, by which children born in concubinage (*concubinatus*) fell under the power of their father by his subsequent marriage with their mother. Owing to various causes a species of morganatic marriage had grown up in Rome. The legal marriage of the Romans was impeded at different periods by arbitrary restrictions, within which the impulses of human affection could not always be confined. A son or daughter could never marry without their father's consent; and at one time marriage was forbidden between the freeborn and freedmen or freedwomen. Such restrictions did not apply to concubinage, which

Legitimation.

was, like marriage, a permanent union of one man with one woman, although considered not so honourable, especially on the part of the woman. Under Justinian, there must have been no legal obstacles to their marrying, if they had chosen to marry. It was to children born of such a union, and to them only, that this legitimation applied. By the subsequent marriage of their parents, they fell under the power of their father.

Adoption. Until Justinian altered the law, adoption was a mode of acquiring *potestas*. He enacted that it should continue to have that effect only when a father adopted a child, or a grandfather adopted a grandchild; and that in all other cases adoption should no longer confer the *potestas*, but give the adopted child merely a right of succession in case the adopter died without leaving a will. In the time of Justinian adoption was nearly as much out of harmony with the requirements of social life as it is now. But adoption occupies an interesting place in the history of law. It formed an intermediate stage of progress between the ancient law, which recognised nothing but intestate succession, and the later law, which possessed in the Will a more perfect instrument to settle the devolution of an inheritance. The oldest form of adoption (*adrogatio*) was effected at first by the legislative authority of the Comitia Calata. Only persons that were not under any one's power (*sui iuris*) could be

adopted in this way. By taking advantage of the provision of the XII Tables declaring a forfeiture of the *potestas* if the father thrice sold a son, and by calling in aid a fictitious suit (*cessio in iure*), persons were enabled to adopt those that were *alieni iuris*, that is, under some one's power. In later times, arrogation was effected by rescript of the Emperor (from A.D. 293 the only mode), and simple adoption by a declaration in the presence of a magistrate.

Emancipation.

The paternal power was dissolved by the death of the paterfamilias, or by any thing that deprived either father or child of the status of a Roman citizen. It could also be terminated at the will of the father, by a declaration before a magistrate. This simple act replaced the elaborate proceedings that anciently were required for the emancipation of a child. Here it may be sufficient to observe, without going into somewhat intricate detail, that the last stage in the process of emancipating a son was precisely the same as occurred in the manumission of a slave. From this a singular consequence followed. The duties and rights of an emancipated son were identical, except in one point, with those of a freedman: the father could not exact a promise of work from his son; the son owed his father reverence, said the Praetor, not menial work. The emancipated son could not sue his father, except in a fit case, and with the leave of the Praetor;

he was bound to maintain an indigent father. The father, in like manner, was bound to support an indigent son. The relation of a father to an emancipated son governed the wider relation of parent and child. The obligations between a parent and child, where the *potestas* did not exist, were the same as the obligations between a father and his emancipated child.*

Sect. 3.—Husband and Wife.

Wives *in manu.*

While the powers of the Roman father over his children appeared even to the Romans themselves as singular, the relation that subsisted between husband and wife during the greater portion of the Republic and the whole of the Empire presents in a different way an equally conspicuous contrast with the laws generally prevailing in Christendom. There was, indeed, a stage in the history of Rome when the position of a wife was almost identical with that of a slave or of a child under the paternal power. A wife *in manu viri* could enjoy no rights of property (beyond a *peculium*), and she was described,

* *Capitis deminutio.*—*Caput* included three elements, freedom, citizenship, and family rights. The loss of freedom, as when a person was captured by an enemy, was *maxima deminutio capitis.* The loss of citizenship, as by the punishment of deportation to an island, was *media* or *minor deminutio capitis.* A change of family, by adoption, or arrogation, or emancipation, was a *minima deminutio capitis.*

not inaccurately, from a technical point of view, as the daughter of her husband (*filiae loco*). There is no specific example of the husband's legal exercise of the *ius* (or *potestas*) *uitae necisque:* Papinianus, indeed, is reported as laying it down that the husband had no such right: in case of a serious charge (infidelity or drunkenness), the wrath of the husband was tempered by the advice of a family council. Nor is there any record of the sale of a wife, except by way of fiction in a form of release from the *manus*.

Creation of *manus*.

The marital power (*manus*) appears under two aspects. On the one hand it had a reverential and religious aspect. It was created by a very solemn religious ceremony (*confarreatio*) before the Pontifex Maximus and the Priest of Iuppiter (*Flamen Dialis*); and only the offspring of such a union were eligible for the higher priestly offices. Here the subjection and dependence of the wife were hallowed by religious associations. On the other hand, the Roman *manus* shows also a baser, and perhaps more intelligible, origin. The woman was nominally sold to the husband (*coemptio*), and conveyed by the same forms as if she were a slave, the only difference lying in the spoken words of the conveyance. So strictly was the wife assimilated to property, that if she were delivered to the husband without the proper forms of conveyance, she did not fall

under his *manus* until the usual period of prescription (*usus*) had passed.

Dissolution of *manus*.

It was by taking advantage of this circumstance that the Romans were able to get rid of the *manus* almost entirely. A title by prescription could not be acquired unless the possession were continuous; and accordingly, if a wife absented herself, and returned to her father's house before the year of prescription had run out, the prescription was broken. So early as the XII Tables, this mode of avoiding the *manus* had acquired the constancy of a custom. They contain a provision fixing three consecutive nights (*trinoctium*) as the extent of absence that prevented the husband from acquiring *manus* by prescription. The *manus* had almost disappeared before the end of the Republic, and under the early emperors it was looked upon as a mere antiquarian curiosity.

If the marriage had taken place with the forms of *confarreatio*, the *manus* could be dissolved only by the reverse process of *diffarreatio*, also under the authority of the Pontifex Maximus, who took care that the act should be infrequent by making it both costly and repulsive. If the marriage had taken place with the forms of *coemptio*, the *manus* was dissolved by the reverse process of *remancipatio*.

Wives not *in manu*.

If the wife was not *in manu mariti*, she remained in the power of her father—in law a member of her father's family—and wholly free

from the power of the husband. Thus the only legal consequence of a marriage was that the offspring were under their father's power and enjoyed rights of inheritance: between husband and wife there was no bond of legal duty. The wife could not compel her husband to maintain her; the husband had no rights to the wife's property, except such as were given him by prenuptial contract.

If the husband or the wife were not satisfied, the remedy was divorce. It was not necessary to obtain the authority of any tribunal for the dissolution of the marriage; by a simple formal intimation either party could at once terminate the union. But the *Lex Iulia de Adulteriis* (B.C. 18) required a written bill of divorce (*libellus repudii*) to be delivered in the presence of seven Roman citizens above the age of puberty as witnesses; though eventually delivery was not necessary. While the Roman jurists gloried in the ancient maxim of their law that marriage should be a free union (*matrimonia esse libera*), the ecclesiastics, who acquired an influence over legislation by the conversion of the Emperor Constantine, set themselves with inflexible resolution to uproot the ancient freedom. Upon the principle of divorce by mutual consent they were unable to encroach, but they succeeded in obtaining enactments from successive emperors confining the right of repudiation by one party

Divorce.

alone to cases where the other had been proved guilty of gross misconduct.

Custody of Children. If neither party was in fault, the general rule seems to have been that the father took the custody of the boys, and the mother of the girls; if the divorce was owing to the fault of the father, the wife was entitled to the custody of the children, and the father was obliged to maintain them; if the mother was in the wrong, the father obtained the charge of the children.

Dos. The peculiar conflict that emerges in the Roman Law between the rights of the father and of the husband is connected with an institution that has exercised a vast social and economical influence. Marriage (*sine manu*) gave the husband no claim of any sort upon the wife's property. But he was under no obligation to maintain her. The Roman point of view seems to have been that it was the duty of a father to maintain his daughter, notwithstanding that she was married. But as it would have been practically impossible to perform this duty day by day and week by week, when the daughter lived under her husband's roof, the father once for all compounded with the husband by giving him a sum down. This sum was called *dos*. By the *Lex Julia de Adulteriis* (B.C. 18) every father was compelled, on the marriage of his daughter, to give her a *dos* if he had the means. The husband enjoyed the use of the property during the mar-

riage, but on its disolution, whether by death or divorce, the property reverted to the wife's father. If the *dos* was given by a paternal ancestor, it was said to be *profecticia;* if it was given by the wife herself, or by any other person than a male ascendant, it was called *adventicia.* A *dos adventicia* was understood to be a present to the wife after the dissolution of the marriage, unless it was specially agreed that it should revert to the donor, in which case it was called *receptitia.* There are distinct signs that in the beginning the husband's rights over the *dos* were more extensive than they afterwards became, and the tendency of the later law was to restrict the husband rigorously to the income of the property, and not to give him power of disposing of the capital.' Thus he could not sell or mortgage his wife's lands even with her consent.

The *Lex Iulia de adulteriis et de fundo dotali* (B.C. 18) forbade the husband to alienate lands in Italy given him as dowry (although they were in law his own property), if the wife objected, or to mortgage them even if she consented. Justinian prohibited the husband from alienating or mortgaging lands given him as dowry, whether in Italy or in the provinces, even with the wife's consent.

Donatio propter Nuptias.

The *dos* was usually the subject of a prenuptial contract; but it might be commenced or increased after the marriage. By the middle of the fifth century (A.D. 449), a settlement might be made on the wife by the husband of a nature corre-

sponding to the *dos:* it was called *donatio ante nuptias.* Iustinus, the predecessor of Justinian, allowed such gifts to be increased after marriage, thus breaking in upon a rule very jealously guarded by the older law, that no gifts were binding between husband and wife. Justinian allowed such a gift not only to be increased, but to be first given, after the marriage; and, in correspondence with this, he changed the name to *donatio propter nuptias.* A gift by a husband to a wife, or by a wife to a husband, could be revoked by the donor at any time during life.

English Marriage Settlement.

The provisions of the Roman Law thus furnish a singular contrast to the leading characteristics of an English marriage settlement. A settlement usually gives an interest in the property to the offspring of the marriage; but in Rome the children had no interest in the *dos.* By the clause in restraint of alienation, a wife is prevented from giving away the capital of her property to the husband, but it is only by depriving her of the power of alienation in regard to everybody else; while the English law makes no provision to protect feeble husbands from avaricious or extravagant wives.

Sect. IV.—Tutors and Curators.

Functions of Tutor.

The office of *tutor* in the Roman Law approaches nearly to that of a trustee. The tutor was appointed to act on behalf of children *sui*

uris under the age of puberty, but his duties differed considerably from the duties of an English guardian of children. The tutor did not himself undertake the custody and education of the pupil (*pupillus, pupilla*) entrusted to his care. If the will appointing the tutor did not name any person for that duty, the mother of the children was entitled to the custody of them so long as she remained unmarried, unless the Praetor decided otherwise. The tutor was bound to make his pupil a proper allowance for maintenance; but, as a general rule, unless the amount were fixed by the will, the sanction of the Praetor must be obtained. The main duties of the tutor were to manage the property of the pupil, and to authorise him to bind himself by contract (*ut negotia gerunt et auctoritatem interponunt*, Ulp. *Reg.* 11, 25). In dealing with the property of the pupil, the tutor was subject to rules such as now govern trustees. He was bound to make good all loss sustained by his neglect or wilful wrong; he was bound to take such care and so manage the property as a good head of a family would manage his household affairs; he could charge nothing for his services, and he was not allowed to obtain any advantages for himself, but must exercise all his power for the sole benefit of the pupil.

Disabilities of Pupil.

Although a pupil had no property, he nevertheless had need of a tutor. A child could not

bind himself by contract; and there were some legal transactions, as acquiring an inheritance, which, although in a particular case they might be wholly beneficial to him, yet required the authority of a tutor. The simplest course would have been to hold that no person under the age of puberty could enter into any legal transaction, and to make the tutor a statutory agent whose acts within the scope of his authority should bind the pupil's estate. But that was not the theory of the Roman Law. The theory was as far as possible to make the child the actual contracting party, but not to bind him unless the tutor was present and gave his sanction (*auctoritas*). Until the child passed his seventh year, he was not considered capable of so binding himself, even with his tutor's authority; accordingly, if any action were brought by or against the *pupillus* up to that age, the tutor acted for him in his own name. But if he were above seven, the suit went on in the name of the pupil, the tutor merely giving his sanction. The rule prohibiting a tutor from getting any advantages from his trust equally prevented the validity of any contract whereby he authorised an obligation beneficial to himself (*Regula est iuris civilis in rem suam auctorem tutorem fieri non posse*).

Contracts of Pupil.

The general rule determining the incapacity of a child was that he might better his condition,

even without the authority of the tutor, but he could not make it worse, unless he had his tutor's authority. In such contracts as create obligations for both contracting parties, as sale or letting on hire, if the tutor did not give his authority, those that contracted with the pupil were themselves bound, but he was not in turn bound to them. This rule was subject, however, to equitable restrictions in favour of the contracting party: a pupil could throw up a purchase, but he could not keep what he had bought and refuse payment, or demand back what he had sold without restoring the price.

Appointment of Tutors.

Tutors were appointed (1) by will; (2) failing an appointment by will, by operation of law; (3) failing both these modes, by the magistrate. At first testamentary tutors (*tutores testamentarii*) could be nominated only by a *paterfamilias* to those under his power; but the Praetor confirmed, either as of course or upon inquiry as to the fitness of the tutor, the appointment by a father that had not the paternal power, or by a mother. Failing testamentary tutors, the kin were obliged to undertake the duty to the children (*tutores legitimi*). In the ancient law, the agnatic kin thus succeeded; but Justinian left it to the next of kin, whether agnatic or cognatic. In default of kin, the appointment of tutors was at last vested in certain magistrates by statute. The *Lex Atilia* (between B.C. 366 and 186; pos-

sibly 294) gave the urban Praetor and a majority of the tribunes of the Commons the power of appointing tutors, and the *Lex Iulia et Titia* (B.C. 31) gave a similar power to Presidents of Provinces. Appointments under those statutes fell into disuse, and in the time of Justinian the Prefect of the city of Rome, or the Praetor, and, in the Provinces, the Presidents, after inquiry, or the magistrates, by order of the Presidents, appointed tutors (*tutores datiui*).

Exemptions from Tutela.

The office of tutor was obligatory on those that were duly nominated. But the inconvenience arising from that rule led to the establishment of numerous exceptions (*excusationes tutorum*), which are minutely described by Justinian, but are of little interest at the present day. Before entering upon the discharge of his duties, the tutor was in certain cases required to give security against misconduct (*rem saluam fore pupillo*). Testamentary tutors were exempt from giving security, "because their honour and diligence had been approved by the testator himself." Statutory (*legitimi*) tutors must give security, as they came in by relationship, which was no guarantee of honour and diligence. Tutors appointed by the higher magistrates, after inquiry, were not burdened with security, "because only fit persons were chosen"; but those appointed by the inferior magistrates must give security.

The tutela ended with puberty, which was fixed at twelve for girls and fourteen for boys. But even before that, tutors could be removed by the Court for misconduct or unfitness. End of Tutela.

The old law, which made puberty the age of legal majority, was obviously defective. Accordingly, while in strictness every legal act by a person above the age of puberty was valid, a practice grew up of rescinding any bargains or conveyances made by persons above puberty, but under twenty-five, if the contract was an imprudent one for the minor. This practice is usually ascribed to the *Lex Plætoria* (B.C. 326). It was called *restitutio in integrum*, as the Prætor, under the provisions of this statute, restored the defrauded or indiscreet minor to the position existing before the unfortunate transaction took place: it blotted out the transaction. This cure might have been worse than the disease, had it not been that a minor could obtain the appointment of a Curator, whose duty it was to see that the minor was not overreached by another or prejudiced by his own foolish acts, and whose approval (*consensus;* not *auctoritas*) of the transaction made it unimpeachable. Except for that purpose it was not generally essential that curators should be appointed to minors; but they could be appointed also to lunatics, the deaf, the dumb, incurables, and spendthrifts. Spendthrifts (*prodigi*) were those Minors. Curators.

who, in consequence of wasting their property, were prohibited by the Praetor from the management of it. The mode of appointment of curators was very much the same as in the case of tutors. But a curator was not appointed by will; yet such an appointment was confirmed by the Praetor or President of the province. *Curatores legitimi* were such as were appointed to spendthrifts and insane minors (*furiosi*) under the law of the XII. Tables: as in the case of tutors, they were the nearest agnates. Where there was no curator by will or by statutory provision, *Curatores datiui* were given by the same magistrates as gave *tutores datiui*. With regard to security, exemptions, and most other matters, the same rules as applied to tutors applied also to curators. With all the similarities between tutors and curators, there is this special distinction, that while the tutor was said to be *personae, non rei, datus*, the curator was *non personae, sed rei datus*, and so could be appointed for a single transaction.

CHAPTER III.

THE LAW OF PROPERTY.

SECT. I.—OWNERSHIP.

Origin of Property.

THERE is no point on which theoretical speculations have been more completely falsified than the question of the origin of property. The suggestion that ownership arose when men began to respect the rights of the first occupier of what had previously been appropriated by no one is curiously the reverse of the truth. When ownership is first recognised, it is not ownership by individuals, but ownership by groups—the family, the village or commune, the tribe or clan. Individual property arose from the breaking up of such groups, and the distribution of the rights of the whole among the members. In some cases this process was hastened by wars. There are distinct traces that individual property was pre-eminently that which the warrior had seized as the spoil of victory; among the Romans, for example, the spear was the highest symbol of property.

Ancient Communism.

But the student of Roman Law will learn nothing of this widespread primeval communism from the works of the Roman jurists. From the earliest times of which we have a record, the institution of private property was completely developed in Rome, and hence the singular influence it has exerted on the destinies of European nations.

Defects of Old Law.

The law of property in Rome was in the beginning marked with two characteristics, which became increasingly inconvenient as the empire extended: the modes of conveying property were ceremonial and cumbrous, and only citizens of Rome could be owners. Few articles of any importance in ancient times could be conveyed without mancipation, a ceremony thus described by Gaius (I. 119):—

Mancipation.

Mancipatio is a fictitious sale; and the right is peculiar to Roman citizens. The process is this:—There are summoned as witnesses not less than five Roman citizens above the age of puberty, and another besides, of the same condition, to hold a balance of bronze, who is called the *libripens*. The alienee, holding a piece of bronze (*aes*), speaks thus:—"I say this slave is mine *ex iure Quiritium*, and let him be bought for me with this piece of bronze and balance of bronze." Then with the piece of bronze he strikes the balance, and gives the piece of bronze, as if the price to be paid, to the mancipator.

Res mancipi.

The objects that required mancipation (*res mancipi*) included not merely land and houses (in Italy), but also free persons (in the formali-

tios of emancipation), slaves, beasts of draught and burden, and rural (but not urban) servitudes. Other objects were called *res nec mancipi*.

Quiritarian and Bonitarian Ownership.

When a *res mancipi* was delivered to a buyer without *mancipatio*, the ownership still remained with the seller: the thing had not passed with the form necessary for conveyance of the ownership. But according to the old law, this evil was not without a remedy. For it was held that where a man had received a thing in good faith (*bona fide*) and in a way that would have made him owner but for some external defect (*ea iusta causa*)—conditions, however, that were not required in the earliest law—and had possessed it for two years in the case of land or houses, or for one year in the case of other things, he became owner by prescription (*usucapio*). Lapse of time thus served to cure defective titles in all cases where a mere informality stood between a man and the ownership to which he was entitled. One difficulty alone remained. If the possessor lost possession of the thing before the time of *usucapio* had run out, he could not, on discovering the thing in possession of some one else, sue as owner, because his title was not yet complete. This defect was removed by a Praetor of the name of Publicius, who may have been the Quintus Publicius said by Cicero in B.C. 66 to have been lately (*nuper*) Praetor. Publicius gave an action (hence called *actio Publiciana*) to

a possessor under those circumstances. Henceforth the position of a possessor of a *res mancipi* delivered without mancipation was for all practical purposes as good as ownership. Even before his title was perfected by *usucapio*, he was secured in the practical enjoyment of the ownership. This form of ownership is called by Theophilus—the first commentator on the Institutes of Justinian—Bonitarian ownership (the possessor was said *rem in bonis habere*), to distinguish it from Quiritarian ownership (*dominium ex iure Quiritium*). When at length *mancipatio* fell into disuse, long before the time of Justinian, who formally abolished it, the distinction vanished, and all kinds of property, moveable or immoveable, were transferred by simple delivery.

Possession. Aliens.

The second great defect of the old Roman Law was more difficult to remove. At first no alien had any *locus standi* before a Roman tribunal; he could not hold property, or make a contract, or even sue for a wrong. This exclusive system was inconsistent with the world-wide dominion Rome was destined to achieve; and in nothing is the legal genius of the Roman people more conspicuous than the skill with which they made the narrow principles of the ancient law yield to the necessities of the law of progress. In the case of ownership the process by which aliens were secured in the enjoyment of rights of pro-

perty was simple but effective. The Praetor could not give to aliens the *dominium ex iure Quiritium*, but he could use his power to secure them in the actual enjoyment of the objects of property. He could punish anyone that trespassed on the alien's land, or that attempted to eject him from his holding. It was part of the policy of the Praetor, while altering things, scrupulously to respect names; and thus he professed to give, not ownership, but only *possessio*. To protect this possession, he granted special remedies, called Interdicts. Possession was thus ownership in substance, in everything but in name.

Transfer by Delivery.

The disrepute into which the ceremony of *mancipatio* fell, and the desire to make simple *delivery suffice for the conveyance of all kinds* of property, were strengthened remarkably by the Praetorian law of Possession. Delivery—the physical transfer of a thing with the intention of passing the ownership—was the natural mode of transferring possession. It was thus the authorised mode of conveying the species of property recognized by the Praetor; and even Roman citizens were glad to rest content with this conveyance and the rights it conferred. But actual delivery might prove inconvenient: the thing to be delivered might be too heavy, or it might be land, or it might be at a distance. Accordingly it was admitted that delivery might take place in

such cases even without actual transfer of physical possession. Thus, it might be effected by placing the person to whom a thing was meant to be transferred in view of it, and declaring that he was free to take possession of it: this was called delivery *longa manu*. Delivery of the keys of a house or of a warehouse was sufficient to transfer the property either in the house itself or in its contents. Putting marks, as upon logs of wood, was another way of effecting legal delivery, where it would have been difficult to have an actual dealing with the physical possession. To deliver a thing at a man's house was considered the same thing as delivery to himself. If the person to whom it was sought to transfer the ownership was already in actual possession, the ownership could be transferred by a mere expression of a wish to that effect by the owner. That was called delivery *brevi manu*. Mere physical delivery alone, it must be borne in mind, did not transfer the ownership; it did so only if the owner made the transfer with that intent. In the case of sale, something more was required: the buyer did not become owner even by delivery, unless the price were paid or the vendor gave the buyer credit. Nor was a mere agreement to deliver sufficient (*Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur*).

The English law of sale offers a conspicuous contrast upon this point to the Roman Law. Delivery is not necessary in the English law to transfer the ownership of the thing sold. Whether upon a contract of sale the goods pass to the buyer with or without delivery is a question solely of the intention of the parties. If that intention is expressed, there is an end of the controversy. Generally speaking, however, no intention is expressed, and then certain presumptions of law come in. If specific ascertained goods are sold unconditionally, the property immediately vests in the buyer, unless it can be shown that such was not the intention of the parties. Delivery in English Law.

Here may be noticed a fallacious distinction introduced by the Roman writers, and followed by their English copyists. Some things, we are told, are corporeal, others incorporeal. Corporeal things can be touched, as a farm, a slave, gold, or wheat. Incorporeal things cannot be touched; they consist of rights, as an inheritance, a usufruct, or an obligation. This means that the right of inheritance or the right of usufruct is incorporeal. Corporeal things, we are told, can be possessed and delivered; incorporeal things do not admit of possession or delivery. But with all this subtlety the jurists overlooked the fact that they were making a distinction without a difference. The right of ownership, which was Incorporeal Things.

transferred by the delivery of the thing, is just as incorporeal as the right of usufruct. So arbitrary is the division that a life-interest in land is a corporeal thing in English Law, and a life-interest in land was incorporeal in the Roman Law. The meaning is simply that delivery was confined in Roman Law to the transfer of ownership, whereas in English Law the delivery of land might be for an estate for life, or in fee-simple, according to the intention of the parties. The true distinction is between the groups of rights transferred by delivery, and those transferred in other ways: in the Roman Law the first group consisted of ownership only; all other rights to things were transferred in a different manner. By a figure of speech, the rights transferred by delivery were said to constitute corporeal things: when the Roman jurists spoke of delivering a corporeal object, what was really delivered was the ownership of that object —an incorporeal thing.

Prescription.

If the person who delivered a thing was really the owner, then the delivery at once operated to give the ownership to the transferee. If he was not owner, the delivery had not that effect, because no one can transfer to another greater rights than he has himself (*nemo plus iuris ad alium transferre potest quam ipse haberet*). The defect was curable by prescription. If a person at the time when any thing was delivered to him

did not know any defect in the title of the transferor, and believed that he obtained the ownership, he was said to be a *bona fide possessor*, and was in a condition to become owner if he continued in possession for the time required by law. Usucapion had required two years in the case of land and houses, and one year in the case of other things. Justinian fixed the period of prescription at three years for moveables; ten years for immoveables, if both the possessor and the person claiming adversely lived in the same province during the whole time (*inter praesentes*), and twenty years if during the same period they lived in different provinces (*inter absentes*). But the possession must be uninterrupted. This did not mean that the articles should not change hands: each person that took the thing in ignorance of any defect in the title could add to his own time of possession (*accessio possessionis*) the times of possession of all his predecessors that had been in the same blissful ignorance.

Stolen Goods.

In the case of moveables, however, it was but rare that a possessor got any benefit from his innocence. If the thing had been stolen—and, where a thing belonging to one man was found in the possession of another, most likely it had been stolen—it could not be acquired by prescription by any length of time. Under the *Lex Atinia* (? B.C. 198), the taint thus attaching to stolen goods (*res furtivae*) could not be removed

until they got back to the possession of the true owner. Land was not an object of theft (though Gaius tells us that some of the old writers thought it was); but a similar taint attached to land or houses from which the owners had been driven by violence (*res ui possessae*): even a subsequent *bona fide* possessor in that case did not acquire by prescription.

Positive and Negative Prescription.

The rules just stated illustrate the nature of positive prescription as distinct from statutes of limitation or negative prescription. In the case of positive prescription, the conditions of ownership depend upon the mental state of the possessor, limited by the stringent rule that goods stolen and lands seized by force are incapable of being so acquired. The dominating purpose of the old *usucapio* was in fact merely to cure informalities in the mode of acquisition. Negative prescription means that the true owner is debarred of his legal remedy if he neglects to seek the aid of the tribunals for a given time. Here the law contemplates distinctly divesting the true owner of his rights, but without giving the possessor any positive title. It is unimportant what was the state of mind of the possessor, or whether there was any taint in the article. At first, Roman Law had no statute of limitation, but in the time of Justinian the period for actions generally was thirty years.

Another important mode of acquiring owner-

ship was *Occupatio*, or the taking possession of a thing belonging to nobody (*res nullius*), but capable, nevertheless, of being held in ownership. In the eyes of the Romans, all untamed living creatures, whether their habitat is the air, the land, or the sea, were *res nullius*, and became the property of the person by whom they were captured. Rome had no game laws. A man might be forbidden to go upon another's land to hunt or snare birds; but if he went and actually caught any bird or beast, they became his property. A bird or beast that was wounded belonged to him that actually took it, and not to him that merely struck the blow. If a wild creature after being caught escaped either out of sight or practically out of reach, it was again considered *res nullius*, and open to the first captor. Domesticated and tamed animals were not *res nullius*, and any appropriation of them without the will of their owner was theft. Pigeons and peacocks and birds might go beyond the reach of their owner, but yet return. So long as they did not lose the habit of returning (*animus revertendi*), they were considered as domesticated animals. When bees hived, the young swarm belonged to the owner of the bees so long as he kept them in view and could follow them up; otherwise they became the property of the first person that hived them. Precious stones found in a state of nature also became the property of the first taker.

Occupatio.

Game Laws.

Tame Animals.

Pigeons.

Bees.

Precious Stones.

Treasure-trove. Treasure-trove (*thensaurus*)—that is, treasure, or valuable things generally, left in the earth by persons unknown for a long time (*condita ab ignotis dominis*), belonged—at least after the time of Hadrianus—half to the finder and half to the owner of the ground; but it must be found by chance, not by prospecting. Lastly, the property of an enemy was *res nullius*. To this barbarous doctrine the Roman Law recognised no limitation. Lands, houses, moveables, wife and children—the enemy himself if alive—all, when taken in war, became the spoil of the victor; while immoveables went to the Fiscus, moveables went to the captors, subject to the rules of prize. The individual soldier kept what he gained by individual enterprise and not as a sharer in a common movement officially ordered or sanctioned.

Enemy's Property.

Accession. The last mode of acquisition is Accession. Accession is of four kinds:—(1) of land to land; (2) of moveables to land; (3) of moveables to moveables; and (4) of labour to moveables. The first case, the accession of land to land, arose from the action of streams and rivers in altering the distribution of land. In its higher reaches a river impetuously sweeps off patches of land, which, as its velocity diminishes, or as intercepting abutments occur, it gradually deposits. Such an increase of land, so gradual as to be at each moment imperceptible, was called *alluvio*.

Alluvion.

the increase belonged to the owner of the lands enriched by the accretion. If, however, the part detached was large enough to be followed up and recognised by the owner, he still retained his ownership. If the deposit takes place in the bed of the river, an island is gradually formed. The ownership of such an island was determined by its position in the stream. If it lay wholly to one side of a line drawn longitudinally along the middle of the stream, it belonged to the owner of the land on that side of the river; if there were more than one such owner, it was divided among them according to the extent of their lands along the bank, the island being supposed to be cut across by lines drawn from their respective boundaries at right angles to the median line of the stream. If the island lay in mid-stream, partly on one side and partly on the other of the median line, then it belonged to the owners on the two banks, their shares being determined by lines drawn as aforesaid. If an island were formed by a river changing its course, forking into two branches and uniting lower down, the ownership of the land so surrounded was not changed. If a river permanently alters its course, leaving its old bed dry, that bed belongs to the landowners on both banks of the river, divided in the way already stated when an island arises in mid-stream.

Islands formed in Rivers.

Old Beds of Rivers.

Moveables accessory to land.

Moveables accede to land when one man sows, plants, or builds on another's land. The maxim of the Roman Law was that every thing fixed into the land upon its surface became the property of the owner of the soil (*Superficies solo cedit. Omne quod inaedificatur solo cedit*). The owner of the principal was the owner of the accessory. In its primary aspect, the notion of principal and accessory is arbitrary, although not illogical. A gold setting is used to show off a stone on a ring: the gold is the accessory, even though it may be more valuable, simply because it is there, not for itself, but for the purpose of the stone. The ground upon which a pillar rests is the principal, because it can exist without the pillar, while the pillar cannot exist without the ground. This arbitrary idea was used to determine a difficult technical question. When land was built upon, and the land did not belong to the person that built, a conflicting claim of ownership arose. It would have been impossible to consider the land-owner and the house-owner jointly owners, for who was to determine their respective shares? Hence in all cases where the materials of different persons got so intermixed that it was inexpedient to separate them, the question of ownership was determined by the rule that the owner of the principal should have the accessory. At first the law was content to let the question rest there: whatever was built on

the land belonged to the owner of the land. But a question of equity remained behind. Suppose the owner of the land built with material belonging to another. The XII Tables provided that the landowner should, in that case, pay double the worth of the material to the owner of the material (*actio de tigno iuncto*): they did not allow the building to be dismantled in order that the material should be restored. Suppose the owner of the material built on land not belonging to him. He either knew that, or he did not. If he knew it, he acted with his eyes open, and lost his property: he was assumed to have intended to make a present of the building to the owner of the land. Seuerus and Antoninus, indeed, allowed him (A.D. 213) to recover his material if the building was demolished, provided it was shown that he actually had no *donandi animus;* but Justinian did not accept this view. If, on the other hand, the owner of the material thought he was building on his own land, the Praetor protected him from ejection, unless the owner of the land offered compensation. If, however, he accidentally lost possession, and the owner recovered the land without the necessity of a lawsuit, he had no remedy. To this rule the Roman Law admitted one just and politic exception. A tenant of a house could remove the fixtures that he had placed for his use, provided he did no damage to the house. And a tenant of land was

Compensation.

Unexhausted Improvements.

entitled to compensation for unexhausted improvements (except such as he had specially agreed to execute in consideration of a lower rent), the amount being fixed with regard to the increased value they gave to the land, but not exceeding the actual outlay.

Books.

Pictures.

The idea of accession was also employed in the case of addition of moveables to moveables; such, for example, as writing a book on another man's parchment, or putting gold letters on paper belonging to someone else; but in the case of pictures, it was thought too strong to say that the ownership of the canvas or wood should determine the ownership of the painting. In this case the logical idea succumbed to the test of value. The rules as to compensation came in as before to redress the balance of unfairness.

Manufactured Articles.

The working up of raw materials belonging to another into a new form (*nova species*) received the name of *Specificatio;* but it is in fact only a special instance of accession. Here the question at once arose whether the labour or the material was principal. Manifestly the logical idea was of little use, and, after much controversy, the rule was finally settled as follows:—If any part of the material employed belonged to the workman, the workman was the owner of the new article; if not, the question was whether the article could be resolved into its raw material. If it could, the owner of the materials was held

to be the owner of the whole; if not, the workman was the owner. Thus a vessel of gold, silver, or other metal would be the property of the owner of the metal however exquisite and valuable the workmanship; but a person that had made wine out of another's grapes, or flour out of another's wheat, was the owner of the product, because it could not be resolved into its original material.

But things belonging to different owners might be mixed, and might thus even form new articles, while yet there would be no accession. Thus, where materials whether of the same kind (as lumps of gold) or of different kinds (as your wine and my honey), were mixed by consent of the owners or by chance in such manner that they ceased to retain their individuality, whether they formed a new article or not, the mixture was the common property of the owners of the materials. This was called *Confusio*—a chemical mixture. Again, where the materials retained their individuality (as grains of wheat) and had been mixed by consent, the mixture was the common property of the owners; but, if they had been mixed by accident or by one owner without the consent of the other, they remained the property of their several owners, and, if the owners could not agree about a division, the Praetor would decide. This was called *Commixtio*—a mechanical mixture.

Confusio.

Commixtio.

The institution of private property did not extend to all the material objects of the universe. The atmosphere, for example, or the ocean, is not susceptible of the exclusive possession that lies at the foundation of proprietary rights. But

Res extra nostrum patrimonium.

many things that were not the objects of ownership might be partially appropriated, and rights falling short of ownership might be exercised over them. Such of these rights as the Praetors recognised they protected by Interdicts.

Sea-shore. *Res communes* were things whereof no one was owner, and that all men might use. Such were the air, running water, the sea, and the sea-shore. The sea-shore extended to the highest point reached by the waves in winter storms. The right of fishing in the sea belonged to all men. Any one could haul up his nets on the shore, or spread them out to dry, or build a hut for himself. So long as the structure existed it was private property; but when it fell into ruins the soil again became common. Every one had the right to prevent any construction on the shore that would interfere with his access to the sea, or the beach; and so, where there was any risk of question, it was prudent to get the Praetor's consent before proceeding to erection.

Res Publicae. *Res Publicae* were, in a sense, the property of the Roman people, and the use of them was free to all. The State's ownership was hardly more than supervision or jurisdiction: it was not such ownership as private persons possessed, and as the State itself possessed, like private persons, in many *res publicae* of another kind, such as slaves, mines, lands. The chief examples were public roads, harbours, and rivers, and the banks

of rivers. In Rome itself the roads were specially under the jurisdiction of the Curule Aediles. Every river that flowed in summer and winter was public. The banks also, measured to the highest point of the winter flood, could be used by the public, even when they belonged to private proprietors, for the purpose of landing goods or making fast boats to the trees. The right of fishing, like the right of navigation, was free to all. **Fishing in Rivers.**

Res Uniuersitatis were such things belonging to a municipality or corporation as were free to the use of the public; for instance, race-courses and theatres.

Res diuini iuris consisted of three classes— *sacrae*, originally devoted formally by the Pontiffs under statutory authority to the gods above, as religious edifices and gifts; *religiosae*, devoted at one's will, without any authority, to the deified *manes*, the chief example being ground devoted to the reception of the dead; *sanctae*, such as the walls of cities, so called because a capital penalty was fixed for those that violated them. **Res sacrae.**

Sect. II.—Personal Servitudes.

Ownership, in the full sense of the term, consists of the most extensive rights to things— rights so numerous that they cannot be precisely limited—rights that endure for ever, and are the **Nature of Servitudes.**

subjects of unrestricted alienation. When some portion of the rights of full ownership is given to a person other than the owner to be exercised by such person to the exclusion of the owner, such detached rights were called in Roman Law *iura in re aliena*; for example, servitudes, emphyteusis, mortgage. If the rights of ownership are limited in duration—as an estate for life in land—there emerges a class that is differently described in different systems of law. In England a life interest is generally spoken of as limited ownership: in Rome, a life-interest was regarded not as a form of ownership, but as the antithesis of ownership, as a subtraction from the ownership or a burden upon it—in a word, a servitude (*seruitus*). The same term was applied not only to the indefinite use of land—for example, the Roman *ususfructus* or estate for life—but to the class of rights strictly definite, as rights of way, which in English Law are known as easements. The true distinction is, as in English law, between indefinite rights (such as usufruct) and single or definite rights (such as a right to draw water, or a right to pour the rain-water from your house on to your neighbour's land). The distinction made by Marcianus (D. 8.1.1.) between *seruitutes personarum* and *seruitutes rerum*, and generally followed by modern commentators, is less satisfactory. The servitudes proper — the praedial servitudes

Estates for Life.

(*servitutes praediorum*)—were attached to the things (land or house) over which they were exercised and belonged to persons only as owners of adjoining land or an adjoining house; while usufruct and some similar interests were called personal servitudes (*servitutes personarum*), as being attached to the person that exercised the right, without regard to his owning or not owning adjoining property. If, as sometimes happened, a right that was ordinarily a praedial servitude (as the right of pasturing cattle) was given to a person not an adjoining owner, then it was not a praedial, but a personal, servitude (if not a right under a contract, as of letting on hire). In English Law easements with profits *à prendre* (or rights of common) are comparable to praedial servitudes; when the same easements are unconnected with land, they are said to be easements in gross.

Quasi-usufruct.

A usufruct is the right of using and taking the fruits of something belonging to another. It was understood to be given for the life of the receiver—the usufructuary—unless a shorter period was expressed; and then it was to be restored to the owner in as good condition as when it was given, except for ordinary wear and tear. It might exist in land, houses, slaves, beasts, and in short everything except what is consumed by use—an exception obviously necessary because the thing had to be restored at the end of the

period of enjoyment. By a senatusconsultum, however, it was determined (perhaps within the half-century before Christ) that a legacy of things consumed by use (such as money, wine, oil, wheat, garments), by way of usufruct, should not be void. On the legatee's giving security to return to the heirs of the testator on his death the articles so bequeathed, or to pay their value in money, they were given to him. Such a legacy was merely a loan without interest. As it bore a certain analogy to usufruct, it was called quasi-usufruct.

Rights of *Fructuarius.*

The usufructuary of land became owner of the crops as soon as they were gathered (*percepti*), but not before. Consequently, if he died before that event, the crops belonged to the owner of the land. Generally speaking, but with one exception, the rights of an English tenant for life of land are the same as the rights of the usufructuary. An English tenant may work mines or quarries that have been opened, but cannot open new mines or quarries. The usufructuary was free from this restriction. But he could not cut timber: trees that were dead or overthrown by the wind he could take to repair the house, but not usually for fuel; and he could take branches to stake his vines, and he could lop pollards.

Usufruct of House.

The usufructuary of a house must not alter the character of the building. He must not

divide one room into two, or throw two into one, or turn a private dwelling-house into a shop. He was not allowed even to put a roof on bare walls. He could not put up a new building, unless required for strictly agricultural purposes; and he could not pull down any building, even one he had himself put up. Thus we learn where Coke got his idea that if the life-tenant put up a house, it was waste, and if he pulled it down again, that was double waste. The usufructuary must always use the property, whatever it was, with the care of a *bonus paterfamilias*—the highest diligence known to the law.

Creation and Extinction of Usufruct.

In ancient times, usufruct was established by surrender in court (*cessio in iure*), a fictitious suit, which may be compared with the obsolete Fines and Recoveries of English Law. It could not be created directly by mancipation, because it was incorporeal; but, when the thing was mancipated, the usufruct could be reserved (*usufructu deducto*). In the time of Justinian, however, a usufruct was created either by legacy or by agreement and stipulation. The usufruct was extinguished if the usufruct and ownership merged in the same person; if the usufructuary neglected to exercise his right for the usual period of prescription; or if the thing perished, or its essential character was altered. The usufructuary could not transfer his right so as to make the transferee usufructuary in his place;

No transfer.

but (under the Empire, if not earlier) he could allow another person (by gift, sale, lease, &c.) to enjoy his right, in whole or in part, provided the transferee enjoyed it in his (the usufructuary's) name and on his account.

Usus. Use (*usus*) meant use without the fruits. One that had the use of a farm could take only such vegetables, fruits, flowers, etc., as were required for his daily needs. He must not hinder the farm-work. He that had the use of a house could use it for himself and family—it was doubted if he could receive a guest; and he could not transfer his right to another. Use was established or extinguished in the same ways as usufruct.

Habitatio. *Habitatio* (the right of dwelling in a house) and *operae seruorum* (use of slaves' services) were distinguished from usufruct or use by technicalities that need not be noticed here.

SECT. III.—PRAEDIAL SERVITUDES.

Nature of a Praedial Servitude. A praedial servitude is a definite right of enjoyment of one man's land by the owner of adjoining land. The land in favour of which the right is created is called *praedium dominans*; the land subject to the right is called *praedium seruiens*. Servitudes were for the benefit of land in this sense, that the necessities of the dominant land constituted the measure of the enjoyment allowed. A right to lead water to a farm was

restricted to the amount of water necessary for the use of that farm. So if the right was to take sand or lime from adjoining land, then no more could be taken than was wanted for the farm to which the right was attached.

General Maxim.

From the nature of servitude it followed that an owner could not have a servitude over his own land (*Nulli res sua seruit*). An owner, who, as such, is entitled to every possible use of his land, has no need of a right to one particular mode of enjoyment.

Servitudes are Negative or Affirmative.

Again, the nature of the duty imposed by a servitude on the owner of the servient land is purely negative. Except in the case where a man's walls or pillars were used to support another's building (*seruitus oneris ferendi*)—where the agreement to support involved the duty to repair in case of need—a positive duty could not be imposed. (*Seruitutum non ea natura est ut aliquid faciat quis, sed ut aliquid patiatur aut non faciat.*) When the duty laid upon the owner of the servient land was merely not to do (*non faciat*) something (as, not to shut out his neighbour's light), the servitude was said to be *negative*; if it consisted in forbearance (*patiatur*), in permitting another to do what but for the servitude he would not be entitled to do (as, to allow another to walk across one's land), the servitude was said to be *affirmative*.

Servitudes perpetual.

Servitudes were subject to certain other rules of a technical character. Thus, it was said that all servitudes ought to be capable of enduring as long as the land to which they were attached; but exceptions were allowed, and a right of water even from an artificial reservoir might be granted.

Servitudes indivisible.

Again, it was said that a servitude was indivisible. Thus, if the owner of land dies, leaving several heirs, each heir is entitled to the enjoyment of the servitudes. But perhaps the most technical rule of all was that there could not be a servitude of a servitude. Thus, if Titius has a right of leading water through two or three neighbouring farms, neither the owners of these farms nor any other neighbour can have a servitude of drawing water from the aqueduct. But, notwithstanding the rule, an agreement to permit them to draw water bound Titius, although it was not a servitude.

Seruitus seruitutis.

Division of Servitudes.

Praedial servitudes were of two kinds, RURAL (*iura rusticorum praediorum*) and URBAN (*iura urbanorum praediorum*). Rural servitudes affect chiefly or only the soil, and could exist if no houses were built; urban servitudes affect chiefly or only houses and could not exist apart from houses. That is the correct distinction: for a right-of-way, which is a rural servitude, may exist in a town; and a right to rest a beam or joist on a neighbour's wall, which is an urban servitude, may exist in the country. So long as

mancipation was in use, rural servitudes in Italy were *res mancipi*, and could be conveyed only by *mancipatio* or *cessio in iure;* but rural servitudes in the provinces beyond Italy, and urban servitudes in or out of Italy, were *res nec mancipi.*

Among rural servitudes, the most usual were —(1) Rights of way: *iter*, a right for a man to walk but not to drive a beast or a carriage; *actus*, the right to walk and drive a beast or a carriage; *uia*, more extensive, including the right to draw stones and wood and heavily laden waggons. (2) Rights of water; as, the leading of water through another's land (*aquae ductus*). Usually the water must be conveyed in pipes, although, if so arranged, stone channels might be used. In the absence of agreement, the quantity of water to be taken was fixed by custom; but unless by special agreement or by custom the water could not be used for irrigation. *Aquae haustus* is the right of drawing water from a well or fountain on another man's land. The right of taking cattle to water on another's land was called *pecoris ad aquam appulsus.* Again, one might have the right to put cattle to pasture on the land of another (*ius pascendi*), or to quarry for stones, or to dig for sand or chalk, or to cut stakes for vines, and many similar rights.

Rights of Way.

Rights of Water.

Other Rights.

The principal urban servitudes included support to another's building (*oneris ferendi*); in-

Urban Servitudes.

serting beams (*tigni immittendi*) in the wall of another's house for security, or for covering to a walk along the wall; the right to receive, or the right to discharge, the droppings of water from the tiles of a house (*stillicidium*), or the rain water from a gutter (*flumen*); the right against a neighbour to prevent an increase to the height of his house (*altius non tollendi*); the right to prohibit any construction that would shut out light from a house or the general view (*ne luminibus officiatur, et ne prospectui offendatur*); the right of passing a sewer through another's ground (*ex aedificio eius in tuum aedificium*).

Creation of Servitudes.

A servitude, involving a burden upon the ownership of land, could of course be created only by owners. An owner could burden his land with a servitude by agreement and stipulation; and such an agreement would be implied if the owner of the dominant land had enjoyed a servitude for the full period of prescription applicable to land. Again, by will an owner could impose the burden of a servitude upon any person to whom he bequeathed the land. Once established, a servitude continued until it was surrendered by agreement, or merged, when the person to whom a servitude was due became owner of the land upon which the servitude was imposed. In this case, even if the lands were afterwards separated, the servitude was not re-

Extinction of Servitudes.

stored, except by special agreement. If a person entitled to an affirmative servitude did not exercise his right for the period of prescription, he lost it; so, if the person entitled to a negative servitude allowed that period to elapse after the owner of the servient land had violated the servitude (as, for example, by shutting out his lights) without making any complaint, he in like manner lost his right also.

SECT. IV.—EMPHYTEUSIS.

Perpetual Leases.

Emphyteusis is a grant of land for ever, or for a long period, on the condition that an annual rent (*canon*) shall be paid to the grantor and his successors, and that, if the rent be not paid, the grant shall be forfeited. This tenure may be traced to the long or perpetual leases granted by the Roman State of lands taken in war. The rent given for such land was called *vectigal*, and the land itself *ager vectigalis*. The advantages of this perpetual lease were appreciated by corporations, ecclesiastical and municipal. A tenure that relieved the owners from all concern in the management of their lands and gave them in exchange a perpetual right to rent seems to be specially beneficial, or at any rate very convenient, for corporate bodies. The same tenure was adopted by private individuals, under the name of Emphyteusis. In the time of Gaius a

controversy was maintained as to whether Emphyteusis was a sale or a letting to hire of land. It resembled sale, inasmuch as it gave a right for ever to the land, but it differed from sale in that, instead of price, there was an annual payment of a sum down. It resembled hire in respect of the rent; it differed from hire in respect of the perpetual interest of the tenant.

Law of Zeno.

The Emperor Zeno terminated the discussion, by declaring that the incidents of Emphyteusis should be governed by the agreement of the parties, and in the absence of such agreement, that the total destruction of the land or houses should terminate the tenure, but that for a partial loss the tenant should have no claim to an abatement of the rent.

Rights of *Emphyteuta.*

The rights of the tenant (*emphyteuta*) were almost unrestricted, except that he must not destroy the property so as to impair the security for the rent. He paid all the taxes, and he could be ejected from the land if for three years he failed to pay his rent or to produce the receipts for the public burdens. He could sell his right, but was bound to give notice to the owner of the sum offered to him, and the owner had the option of buying it at that amount. If the owner did not exercise his right of pre-emption, the tenant could sell to any fit and proper person without the consent of the owner. The owner was bound to admit the purchaser into possession, and was

entitled to a fine (*laudemium*) not exceeding two per cent. of the purchase money for his trouble.

Section V.—Mortgage.

Contractus Fiduciae.

The earliest mortgage of the Roman Law was an actual conveyance by *mancipatio*, executed by the borrower to the lender, upon an agreement (*contractus fiduciae*) that if the purchase-money were repaid by a day named, the lender would reconvey the property to the borrower. If by the day named the borrower had not paid off the loan, his property was entirely gone. But that was not the worst. The borrower might be willing to repay the money, but in the meantime the lender might have sold the property, and the borrower could not follow it in the hands of the purchaser. This grave defect of the law it was sought to remedy by declaring the lender, under these circumstances, to be infamous. Clamant as these evils were, it required even a sharper sting of injustice to goad the praetor into action. It would seem that, where the conveyance was not made by *mancipatio*, even the solemn promise to return the property on repayment of the loan had no legal effect; and the lender could keep the property although its value might greatly exceed the loan, and refuse to accept repayment. At this point the praetor interfered, and issued an edict to the effect that, where a lender got possession of his debtor's pro-

perty, he should be compelled to give it up on the debtor making a tender of the loan. To the borrower he gave for this purpose an *actio pigneratitia*, such an informal pledge being known as *pignus*. The object of the praetor was merely to redress a flagrant wrong and prevent an unjust creditor from taking advantage of a mere absence of formality to rob his debtor of his property; but the result of his intervention was practically to endow the Roman law with a simpler and more convenient form of mortgage. The mere delivery of a thing was enough to give the creditor full security, while at the same time the ownership remained with the debtor, and thus the creditor was disabled from fraudulently conveying the property. The creditor, not being owner, could not give a buyer the ownership that he himself did not possess.

Pignus.

Hypotheca.

But the *pignus*, although a great improvement, fell short of the requirements of a satisfactory form of mortgage. The creditor did not obtain any security, unless the possession of the property was given to him. Thus, in order to obtain a loan, an owner was subject to the great inconvenience of parting with the possession of his property. In some cases, where a security was desiderated, this condition could not be complied with. Thus when a landlord let a holding to a tenant for the usual period of five years, he naturally desired to have a special claim on the

stock and implements of the farmer as a security for his rent. But as it was essential that these things should remain in the possession of the farmer, the landlord was disabled from enjoying the security of a *pignus*. Some time before Cicero, a praetor of the name of Servius introduced an action by which he gave the landlord of a farm a right to take possession of the stock of his tenant for rent due, when the tenant had agreed that the stock should be a security for the rent. The name given to such a security—*hypotheca*—points to the Greek origin of this contrivance. It was not long, however, before the advantages of such a security were appreciated in other cases, and at length the action introduced by Servius was extended, under the name of *quasi-Serviana*, to all cases where an owner retained possession but agreed that his property should be a security for a debt. Thus in the result, a mere agreement, which need not even be in writing—and without any transfer of possession to the mortgagee—enabled an owner to borrow money and give ample security to the creditor without subjecting himself to any inconvenience. Practically in the later law no distinction (beyond the difference of form) was made between *pignus* and *hypotheca*.

Actio Serviana.

If the mortgagee was not in possession, he could sue for the property in the hands of any person possessing it. He could then exercise the

Power of Sale.

power of sale, which was an inherent right of the mortgagee. Under Justinian, if the parties had agreed as to the manner, time, etc., of the sale, their agreement was to be observed; if not, the creditor must give the debtor formal notice of his intention to sell; and thereafter two years must elapse before the sale could be made. If the creditor sold, he must hand over the surplus, after paying himself, to the debtor. Justinian allowed foreclosure only when the creditor was unable to find a buyer at an adequate price. But the debtor must have due notice, and if within a specified time he did not pay, the creditor obtained the ownership on petition to the emperor. Even then a debtor was allowed two years' grace; but if he did not pay all principal and interest within that time, his claim was absolutely foreclosed (*plenissime habeat rem creditor idemque dominus iam irrevocabilem factam*).

Fore-closure.

Priority.

If the same thing were mortgaged to several persons, and the property was not sufficient to pay them all, the question of preference or priority arose. Except in the case of a small number of privileged mortgages, the question of priority was determined by two principal rules. First, a mortgage made by a public deed, that is a deed prepared by a notary (*tabellio*), and sealed in the presence of witnesses, or even by a

private writing signed by three witnesses, was preferred to an earlier mortgage not executed with these solemnities. Secondly, mortgages unwritten, or, though written, unattested by witnesses, took effect according to priority of time. When the same thing was hypotheeated at different times to different persons, he that has the first hypothec excludes all others; in like manner, the second excludes the third, and the third the fourth. But at what moment does a hypothec take effect? When possession is obtained, or, if the debt is future or conditional, when the sum becomes due? These times were immaterial; priority was determined by the date when the agreement of mortgage was made.

Usually no hypothec existed except by agreement; but in some cases the law set up an implied mortgage. Thus at Rome the landlord of a dwelling-house had an hypothec, in the absence of express agreement, over the furniture (*invecta et illata, i.e.*, whatever was brought for personal use by the tenant) in the house hired from him, as security for the rent, and for other claims he might have under the tenancy. Justinian extended this law to the provinces. In the case of farms the landlord had an implied hypothec over the crops from the moment they were gathered; but he had no hypothec over the agricultural implements, cattle, or slaves, or household furniture, except by special agreement. Implied Mortgages.

Precarium.

Precarium was holding land or a moveable at the will of the grantor. This tenure has a certain historical interest. The tenant, although his interest was so slight, had possessory rights protected by interdicts ("Roman Law," pp. 411—412).

CHAPTER IV.

THE LAW OF OBLIGATIONS.

Sect. I.—General Principles of the Law of Contract.

Conveyance distinguished from Contract.

To determine the true place of contract in a proper classification of law, it is necessary to apprehend, in the first instance, the difference between Conveyance and Contract. Conveyance is the transfer of ownership or of rights partaking of the nature of ownership (rights *in rem*); contract creates obligations or rights *in personam*.

Rights *in rem* and *in personam*.

A right *in rem* is a right availing against all men generally, and is a right to forbearances; a right *in personam* is a right availing against a specified individual or specified individuals, and is a right either to acts or to forbearances. The right of a master over his slave is a right *in rem;* it is a right against all men that they shall forbear from depriving the master of the possession or services of his slave. The right of a patron to maintenance from his freedman is a right *in personam;* it is a right against the freedman alone, and it is a right to an act or service. Ownership,

again, is an aggregate of rights *in rem*. An owner has a right as against all men generally that they shall not deprive him of the possession or use of the thing belonging to him. Contract is the antithesis of ownership. It creates duties binding the promisor or promisors, and no other persons; and those duties are generally to render services, and not merely to exercise forbearances. "The essence of an *obligatio*," says the jurist Paulus, "does not consist in this, that it makes a thing ours, or a servitude ours (*ius in rem*), but that it binds another to give something to us or to do something for us (*ius in personam*)."

Right and Duty correlative.

Right and duty are correlative terms. A cannot have a right unless B or C owes a duty to him. Partly from the circumstance that *ius* had other meanings besides "a right," and that no other Latin term conveniently renders that idea, and partly from the fact that the forms of actions were framed upon an allegation of duty, the Roman jurists did not speak of rights *in personam*, but of the correlative *obligatio*. An obligation was defined to be the legal bond that ties us down to do something according to law (*Obligatio est iuris uinculum, quo necessitate adstringimur alicuius soluendae rei, secundum nostrae ciuitatis iura*).

Contract and Quasi-Contract.

Rights *in personam* (and consequently *obligationes*) fall into two classes. Either they arise from the consent of the parties, or they are

created by law, irrespective of the consent of the parties. The first are contracts; the second are quasi-contracts. The duties of a tutor to a pupil do not arise from any contract between the tutor and the pupil, but they belong to the category of "*obligatio*," and are said to arise *quasi ex contractu*. By the Roman jurists, delicts also are placed as a species of "*obligatio*" alongside contract and quasi-contract. It is true that a person committing a delict is under an obligation to compensate the injured party; and thus, if we look merely to superficial logical characteristics, a delict may be classed with obligations. But the true nature of delict, as I have elsewhere shown ("Roman Law," p. 135), is very different: a delict is a violation of a right *in rem*, and ought, in consistency, to be considered under its proper head of rights *in rem*.

Delicts.

A contract, then, arises from the agreement of the parties; but what is "an agreement"? An agreement involves two elements, a proposal and an acceptance. A person makes a proposal when he signifies to another his willingness to do or not to do something, with a view to obtaining the assent of that other to such an act or forbearance. The proposal is said to be accepted when the person to whom the proposal is made signifies his assent thereto. In the chief contract of the Roman Law, the *stipulatio*, the proposal was made not by the promisor but by the promisee.

Proposal and Acceptance.

"Will you give me 100 *aurei*?" "I will." Here the question is put by the creditor, and the debtor accepts the proposal by his answer. In order to make a valid agreement, it is necessary that the answer should agree with the terms of the question; in other words, that the proposal made should be accepted, and not something else. Thus, if the proposal is unconditional and the acceptance conditional, or *vice versa*, there is no agreement. So if the proposal is for something to be done on a future day, and the acceptance is for a different day, there is no agreement. So again, if the stipulator asks, "Will you give me Stichus or Pamphilus?" and the answer is, "I will give Stichus," there is no agreement, because the proposal is disjunctive and the acceptance is not.

Conuentio is the assent of parties, but not of itself a contract.

Contractus is a *conuentio* to which the law attaches a *iuris uinculum* (or *causa ciuilis*).

Pactum or *pactio* is an agreement not clothed with an action, but available by way of defence to an action. In later times certain pacts (*pacta legitima, pacta praetoria*) were enforced by action, and nevertheless did not obtain the name of *contractus*.

Pollicitatio is a proposal merely; for example, a vow.

Ciuilis obligatio rests on statute or on custom.

Honoraria obligatio is established by the Praetor in the exercise of his jurisdiction.

Naturalis obligatio cannot be enforced by action, but may be used by way of defence or set-off, and will support a mortgage or suretyship.

The main points common to all contracts may be considered under the following heads:—

I. Consent—Error.
II. Time, Place, Condition.
III. Force, Fraud, and Bad Consideration.
IV. Illegal Promises.
V. Incapacity to Contract.
VI. Agency.

I. Consent—Error.—The parties to a contract are said to consent when they agree upon the same thing in the same sense. Their intentions can be expressed only through the medium of language, and this medium is a source of error. Error is essential (error *in corpore*) when it is such as prevents any agreement from being made; it is non-essential (error *in materia* or *substantia*) when it does not prevent an agreement from arising, but may give a right to one of the parties to withdraw from the contract. Essential error is such as prevents the contracting parties from agreeing upon the same thing in the same sense. This may occur in three ways: in the *corpus*, or thing promised; in the nature of the obligation; or in the person of a party. Thus: Essential Error.

(1) I may intend to sell you one slave, you to buy another—as, if I sold Stichus, and you intended to buy Pamphilus, whom you misnamed Stichus. If both had meant the same thing, although they knew it by different names, the contract would have been good. (2) I intend to let you a farm; you think you are buying it. Here again, as the understanding affects the nature of the rights created, the error is fatal, and there is no con-

tract. (3) I intend to lend money to Cornelius, Aulus, falsely representing himself to be Cornelius, gets the money. Here again there is no contract of loan, as I did not intend to bind myself to Aulus; and Aulus may be proceeded against for theft.

Non-essential Error.

In all other cases error was non-essential, and the general rule was that non-essential error did not vitiate the contract. The subject is not free from difficulty. Savigny, who examined the cases very minutely, arrived at the conclusion that in sale even non-essential error vitiated the contract where the difference between the thing bought and the thing that the purchaser intended to buy was such as to put the one into a different category of merchandise from the other. Thus, if I buy a ring, thinking it to be gold when it is copper, or silver when it is lead, the contract is void. Again, if I buy wine, and what is sold is vinegar, or I buy a female slave, and a male slave is sold, or *vice versa*, the contract is void.

Time.

II. TIME.—When an agreement was made to pay money or to do anything on a particular day, performance could not be demanded before that day; and not even on that day, because the whole of the day must be allowed the debtor for payment at his discretion. So if the payment is to be made in a given year or month, the whole of the year or month must elapse before an action can be brought. If the contract is to be performed within a limited time—say, to build a

house in two years—the question arose whether an action could be brought before the whole period had expired, if so much time had elapsed that it was impossible the works could be constructed within the time. Upon this question the jurists were hopelessly divided, but the preponderance of authority seems to favour the view that in such a case the whole time must elapse before an action could be safely brought for breach of contract. If no time was named in the agreement, money promised became due at once; and other promises must be performed within a reasonable time.

Place of Performance.

PLACE.—If a promise is made to pay at Ephesus, the debtor could not be sued in Rome, without allowing for any advantage he might have in paying at Ephesus. Generally speaking, if a debtor promised to pay or do something at a particular place, the creditor could not demand performance elsewhere; but the Praetor had a discretion to allow the creditor to do so, taking care that the debtor was not put to a disadvantage. If nothing was said in the contract as to the place of performance, frequently that was determined by the nature of the promise. A promise to deliver a farm must be performed at the farm; a promise to repair a house must be performed where the house is. When that indication was wanting, the general rule was that the creditor could demand performance in the place

where he could sue—that is, within the jurisdiction to which the defendant was subject. This rule was subject to a certain qualification. A defendant was not obliged to carry a moveable from the place where it happened to be at the time fixed for delivery, except at the risk and cost of the plaintiff, unless he had purposely caused the moveable to be kept in an inconvenient place.

Condition defined.

CONDITION.—A condition exists when the performance of a promise is made to depend upon an event *future* and *uncertain*. If the event is past or present, the obligation is not suspended at all, but either at once takes effect, or is wholly nugatory. If a stipulation is made, "Do you undertake to give it if Titius was consul, or if Maevius is alive?" and neither of these is so, the stipulation is not valid; but if they are so, it is valid at once. But when an obligation depends on an event future and uncertain, it remains to be seen whether the event does or does not happen before the obligation can arise. The event must be uncertain as well as future. A promise to pay money on the death of Titius is a promise that one day will certainly have to be performed, but the day itself is uncertain. Consequently, such a promise was construed as a certain promise to pay, as an existing obligation, only the time for performance being uncertain.[1] The jurists called this *incertus dies*, as distinguished from *condicio*.

Dies cedit — uenit.

A notable distinction was drawn between the inception of the obligation and the time for performance. When an obligation begins to exist, it was said *dies cedit*; when performance may be demanded, it was said *dies uenit*. If I agree to give a sum to Maevius, at one and the same moment the debt exists (*dies cedit*) and payment may be demanded (*dies uenit*) If I agree to pay Maevius a sum of money a year hence, then at once the debt exists (*dies cedit*), but payment cannot be demanded before the end of the year (*dies non uenit*). If I agree to pay a sum to Maevius if the ship "Flora" arrives from Carthage, then until that event happens there is no obligation (*dies non cedit*); but when the event happens, at once the obligation exists, and performance may be demanded (both *dies cedit* and *dies uenit*).

Conditions in Contracts and Wills.

In the Roman Law a somewhat arbitrary line was drawn between conditions in contracts and conditions in legacies or wills. Although in a conditional contract the obligation did not exist until the condition was fulfilled, yet, even if the creditor died before the event, his heir got the benefit of the contract if the event afterwards occurred. A conditional promise gave rise to a hope only (*tantum spes*) that there would be a debt, and that hope was transmitted by the creditor to his heir if he died before the event happened. But if a legacy or an inheritance were given conditionally, and the legatee or the heir died before the event happened, he transmitted nothing to his heir. Again, if the event upon which a promise was made to depend was one that could not or ought not to occur (*i.e.*, was impossible or illegal), then the contract was

Illegal Conditions.

held to be altogether null and void. But in the case of a will, if a legacy or an inheritance were left subject to an illegal or impossible condition, the legacy or inheritance was held to be validly given, and the condition was simply wholly disregarded. "If I touch the sky with my finger," is a condition physically impossible; "If you kill Titius, I will give you 100 *aurei*," is a condition illegal.

III. — FORCE, FRAUD, AND BAD CONSIDERATION.—Force (*uis*) is when a promise is made in consequence of the actual exercise of superior force. Intimidation (*metus*) is a threat of such present immediate evil as would shake the constancy of a man of ordinary firmness. Whether the force or intimidation was applied by the party benefiting by the promise, or by a third party, the contract was equally void. The effect of fraud (*dolus*) was somewhat different. If the fraud was perpetrated by a person not a party to the contract, the contract was valid, and the remedy of the debtor was by an action on fraud against the person that had deceived him. Fraud is a term that may be described and illustrated, but hardly defined. In the widest sense, fraud (*dolus*) means every act or default that is against good conscience. It occurs chiefly in two forms, either the representation as a fact of something that the person making the representation does

Vis.

Metus.

Dolus.

not believe to be a fact (*suggestio falsi*), or the intentional concealment of a fact by one having knowledge or belief of the fact (*suppressio veri*).

Illustrations.

Titius sells a female slave to Gaius, holding out that she had not borne children, when she had. Titius must submit to a reduction of the price, or to have the slave returned.

Maevius sells a house in Rome without informing the buyer that it is liable to a rate for an aqueduct. Maevius must submit to a reduction of the price.

Gaius sells his slave Stichus on account of his habit of stealing, and does not inform the buyer of the character of Stichus. Gaius must pay the loss caused by the slave's thefts. Indeed, he may be sued for damages even before Stichus has stolen anything.

Julius, in treaty for the purchase of a farm, went out with the owner to see it. After the visit, and before the treaty was concluded, a number of trees were blown down by the wind. Julius cannot claim the trees as buyer, because they were severed from the land before the date of the contract; but if the owner knew, and Julius did not, that the trees had been blown down, the owner must allow the value of the trees to be deducted from the contract price.

A vendor, knowing that the land is burdened with a servitude, says nothing about it, but makes a clause in the agreement that he will not be answerable for any servitude to which it may turn out that the land is subject. He may nevertheless be sued for the *suppressio veri*.

Titius sells an ox to Gaius. The ox suffers from a contagious disorder that affects and destroys all the cattle of Gaius. If Titius knew that the ox was diseased, he must pay the value of all the cattle of Gaius; if he did not know, then the price of the ox is to be reduced

to the sum Gaius would have given for it if he had known it was diseased.

Bad Consideration.

Although the Roman Law did not generalise the doctrine of valuable consideration, which lies at the root of the English law of contract, yet if a promise were made for an illegal consideration (*iniusta* or *turpis causa*) it could not be enforced. Again, where a promise was made for an intended consideration and the consideration failed, there was no obligation. Thus, if I gave a written promise to pay 100 *aurei* at the end of six months in consideration of a sum intended to be lent to me, and no money ever was lent, the promise could not be enforced. The agreement was said to be *sine causa*.

Legal Impossibility.

IV. Impossible and Illegal Promises.—*Impossibilium nulla obligatio est.* A person may undertake to do what he cannot perform. That is not impossibility within the meaning of the maxim. A thing is impossible, within the meaning of the maxim, when it is something that no human being can do. If I sell a man that I suppose to be my slave, whereas he is really free, the contract is one that cannot be carried out. Again, if I agree to buy what is really, without my knowledge, my own, the contract is manifestly nugatory. Equally so a contract treating as private property something that is not capable of being so dealt with (as a church, or grave, or

theatre, or forum belonging to the public) is void. Such contracts are invalid even if afterwards the things dealt with become private property and capable of being bought and sold. A sale of a freeman as a slave is not made valid even if the freeman should afterwards be reduced to slavery. But in such agreements an important distinction is to be observed. The impossibility of performing the contract may be known to both parties to the contract, or only to one of them. If a person, knowing that he could not perform his promise, sold a public thing or a freeman to a buyer ignorant of the impossibility, an action for breach of contract, on the ground of deceit, could be successfully maintained against the vendor. The measure of damages was the loss sustained in *consequence of the false representation.*

Illegality.

Again, a contract was void if it contravened some statute, or public morality, or public policy. A contract to steal, or to commit sacrilege, or to hurt or injure anyone, was void. In the Digest many instances exhibiting the Roman notions of public policy will be found. One alone may be given as an example—the *pactum de quota litis.* This meant an agreement whereby a person undertook to conduct a lawsuit for another, receiving a definite share of the proceeds. This was void; but an agreement to support litigation by a loan for interest was valid.

Infants, Minors, Madmen.

V. INCAPACITY. — The presumption that an agreement freely entered into is for the benefit of the parties entirely fails when one of the parties is, by reason of disease or immaturity of mind, incapable of properly judging his own interests. A madman, accordingly, could not bind himself, except during a lucid interval. The case of infants and minors has been already considered (pp. 50, 51).

Slaves.

But, in addition to these grounds of incapacity, which occur in all systems of law, the domestic institutions of the Romans gave rise to special disabilities. Thus slaves, who had no *locus standi* in a Roman court, and who had no property, could not make contracts for themselves. An agreement made by a slave, so far as regards himself, could not have any higher validity than a mere *naturalis obligatio*, upon which he could neither sue nor be sued. But that broad rule of law requires qualification. To the extent to which a slave, by the indulgence of his master, could have property, he had a capacity to contract, and to bind that property in the hands of his master. To the extent of his *peculium* a slave could bind himself where a freeman could do so, and his master was liable to an action (*actio de peculio*) to enforce payment. The master had a right first to deduct all claims he had against his slave, unless indeed the *peculium* was employed by the slave, with the knowledge

of his master, in trade; in which case the master ranked merely as a creditor along with the other creditors of the slave (*actio tributoria*). The master, again, was not liable if the slave, without valuable consideration, undertook to answer for the debt of another.

Persons under the power of a *paterfamilias* were subject to similar, but not identical, disabilities. So far as they had separate property, they could bind themselves by contract. If over puberty, they could be sued personally upon their contracts; but they could not sue their debtors, inasmuch as the benefit, although not the burden, of their contracts accrued to their *paterfamilias*. *Filii-familias.*

VI. AGENCY.—An all-pervading, all-important conception of modern law is Agency or Representation, by which the power of creating legal obligations can be almost indefinitely multiplied. The early Roman Law admitted agency in not a single department, neither in lawsuits, nor in the conveyance of property, nor in the making of contracts: the actual person that intervened in a legal act could benefit by it, and no other. This is to be connected with the strict Formalism of the old law. Every legal act involved elaborate ceremonies, and possessed in the eyes of the Romans a species of sacramental efficacy. It appears to have been absolutely inconceivable to them that the benefit of these forms could be **Agency unknown to Early Law.**

given to a person that had not recited the solemn words, nor partaken in their ceremonies.

Perfect Agency.

A perfect type of agency implies three things: (1) that the authority of the agent is derived from the consent of the principal; (2) that the agent can neither sue nor be sued in respect of the contracts he makes on behalf of his principal; and (3) that the principal alone can sue or be sued. Agency rests upon the authority given by the principal, and it is more or less imperfect, unless the agent is wholly irresponsible, and the principal alone can sue and be sued. The agent does his work most completely when, as soon as the transaction is complete, he drops out of view, and the principal and the third party are brought face to face.

Acquisition through persons *alieni iuris.*

The old law, although it recognised no representation of one free man by another, possessed in the ancient constitution of the family no contemptible substitute. Slaves, sons, and others under the power of a *paterfamilias* could acquire for him, or rather they could acquire only for him and not for themselves. This was not agency—for the slave could acquire for the master not merely without his consent, but in opposition to his express command—but so far it served practically the same purpose as agency. The slave, however, could not subject his master to any burdens. "Our slaves can better our condition, but cannot make it worse." Thus the

slave could act only in unilateral engagements: he could not buy or sell, or make any other contract involving reciprocal duties between the parties. This defect, however, was remedied by the Praetor, who gave an action (*actio quod iussu*) against the *paterfamilias* where, by his express authority (*iussu*), the son or slave had made a contract with a third party. He even went further, and gave an action against the *paterfamilias* when, without express authority, the son or slave had made a contract for the benefit of the master's property (*actio de in rem uerso*). This included all necessary or beneficial expenditure; such as cultivating the master's land, repairing his house, clothing slaves, or paying the master's debts. The ratification of the *paterfamilias* was not necessary; for the son or slave had, in virtue of the Praetorian action, an implied authority to make contracts for the benefit of his estate. The result, therefore, of the old principle of the civil law, eked out by the Praetor's actions, was, that sons or slaves under the power of a *paterfamilias* could act as agents for him, though not for any other person.

Slaves as Agents.

In two instances where the necessities of commerce made themselves felt, an approach was made to agency in the case of free persons as well as of slaves and others *in potestate*. (1) The owner or charterer of a vessel (*exercitor*) was bound by all contracts made by the captain of

Agency of Ship Captain.

the ship relating to the ship, its seaworthiness, and freight. The authority of the captain went to that extent, unless it were limited by his instructions. The captain was personally liable upon his contracts, as well as the owner, and in this respect did not enjoy the immunity of a true agent. Again, the owner could not sue the third parties directly; he had no direct remedy, except against his own agent; and thus his rights fell short of those of a true principal. (2) A servant or manager of a shop or business (*institor*) could bind his principal by all contracts made in relation to the business. Here again, however, the servant or manager was himself liable personally for his contracts; and as a general rule, the principal could not sue the debtors of his manager, but could only require his manager to transfer his rights of action. In extreme cases, however, where it was necessary to avoid loss, the principal could, by leave of the Praetor, sue third parties directly. In a few cases, not strictly falling within the description of the *actio institoria*, a principal was allowed to sue directly persons who had made contracts with his agents. But beyond that the Roman Law did not go in establishing a law of agency for contracts. Savigny, whose opinion carries deservedly great weight, is of a different opinion. He thinks that in the later law agency was universally admitted in non-formal contracts. The arguments

Shopmen as Agents.

Savigny's Views.

that seem to me fatal to this view are discussed at length in "Roman Law" (pp. 621—2).

Sect. II.—Classification of Contracts.

Contracts are divided in the Institutes of Gaius and of Justinian into four classes, according to the manner in which they are made: (1) by acts (*re*); (2) by words (*uerbis*); (3) by writing (*litteris*); and (4) by consent. This division is faulty; it is not quite accurate, and it does not divide the classes according to their most important characters. To prevent mistakes, it will be convenient to place in parallel columns the contracts as arranged in the Institutes, and in the order here followed. Those enclosed in brackets were obsolete in the time of Justinian.

In the Institutes.	Rearrangement.
A. Contracts *re*.	A. Formal Contracts.
1. Mutuum.	1. [Nexum].
2. Commodatum.	2. Stipulatio.
3. Depositum.	3. [Expensilatio].
4. Pignus.	4. [Chirographa].
	5. [Syngraphae].
B. Contracts *uerbis*.	B. Contracts based on Part Performance.
1. Stipulatio.	1. Mutuum.
C. Contracts *litteris*.	2. Commodatum.
1. [Expensilatio].	3. Deposit.
2. [Chirographa].	4. Mandate.
3. [Syngraphae].	C. Contracts for valuable consideration.
D. Contracts *consensu*.	1. Sale.
1. Sale.	2. Hire.
2. Hire.	3. Partnership.
3. Partnership.	
4. Mandate.	

English and Roman Principles of Contract.

The principles upon which this re-arrangement is made, and the historical relations of the several contracts, are considered at length elsewhere ("Roman Law," p. 524, *sq.*). For the English student it is necessary to be on his guard against being misled by the Roman arrangement to overlook the analogies, more important than the differences, between the English and the Roman Law. At first blush, no two systems can appear more at variance. The English Law does not enforce gratuitous promises, or, in technical language, promises made without valuable consideration. The exception is the Formal contract of the English Law—the Deed, by which is meant a writing sealed and delivered. Thus a contract, to be binding, must in England be made by deed, or else be supported by a valuable consideration. But the very idea of "valuable consideration" seems at first sight wholly wanting in Roman Law. It does not appear in Justinian's classification, and, in truth, although in some cases a valuable consideration was essential to a contract, yet the Romans did not perceive the fact, or at any rate did not lay stress on it, and thus fell short of a generalisation that would have assisted them marvellously to clear up the confusion that darkens their system of contract. The Romans started, we need scarcely with our present knowledge hesitate to affirm, with only formal contracts; that is, contracts in

which the legal validity of the promise depended upon the observance of certain forms and ceremonies. Formalism ruled in contract as in every other department of Roman Law. But the progress of Roman Jurisprudence depended upon the skill with which the jurists were able to liberate transactions from the trammels of form. Formalism.

The chief direction taken by their beneficent industry was to lay hold of the principle known to English Equity by the name of Part Performance. Where the law requires a certain form to be observed, and an agreement is made by parties without regard to that form, courts of law would not feel called upon to aid their negligence. But if one of the parties, on the faith of the agreement, has done all that he undertook to do, the other party cannot, without something very like fraud, accept such performance and yet refuse to carry out his part of the agreement. This idea, applied at first in a few glaring instances (*mutuum, commodatum, depositum, pignus*), was ultimately adopted in the widest generality; and it was laid down that where in a bilateral agreement one of the parties had performed what he had undertaken, the other party could be compelled also to perform his part by an *actio in factum praescriptis uerbis*. Such contracts, having no special name, were said to be *Innominate*. They are comprehended in the well-known *formula* of Paulus. "Either," he says, "I give something Part Performance. Innominate Contracts.

to you in order that you may give something to me, or I give something to you in order that you may do something for me; or I do something for you in order that you may give something to me, or I do something for you that you may do something for me" (*Do tibi ut des; do ut facis; facio ut des; facio ut facias*).

Valuable consideration.

When this result was attained, the Roman Law had achieved a great advance, but it still fell short of the English Law; for unless one of the parties had actually performed his engagements, the contract could not be enforced at the instance of either. In the case of sale, hire, and partnership, a valuable consideration was of the essence of the contract.

Pacts.

At this point, strictly speaking, the contracts of the Roman Law are ended. There remains to be noticed the class of PACTS. The Romans were fortunate in the possession of two words that sharply distinguished agreements enforceable by law (*contractus*) from agreements that did not support actions (*pacta*). But in two instances the Praetors and in two others certain Emperors, gave actions to enforce pacts. Those introduced by the Praetor (*pacta praetoria*) were *hypotheca*, already considered (p. 87), and the *pactum de constituto*, to be hereafter explained (p. 149). Theodosius and Valentinianus (A.D. 428) enacted that a mere agreement to give a dowry should be binding without any *stipulatio*. Thus henceforth

Pacta Praetoria.

Pacta Legitima.

the *pactum de constituenda dote* supported an action. Again, Justinian sanctioned the greatest change of all—that a mere promise to give without any consideration (*pactum donationis*) should be enforceable by action. This decision, so strangely at variance with the traditions of Roman law and the principles of general jurisprudence, was dictated by the growing desire of the clergy to encourage gifts to religious persons or for pious uses. These imperial pacts were called *pacta legitima*.

Nudum Pactum.

Except in those four instances, the term *pactum* was strictly applied to an agreement not enforceable by action. But from an early period the Praetors allowed such agreements to be used by way of defence (*Nuda pactio obligationem non parit, sed parit exceptionem*). In English textbooks this maxim is often quoted, but in an entirely different sense. In English Law, *nuda pactio* means an agreement not supported by valuable consideration, an idea that, as we have seen, the Romans did not attain to or did not utilise.

Naturalis obligatio.

An agreement that could not be enforced by action, if it was recognised by law for any purpose, created a *naturalis obligatio*. No action could be maintained upon a mere natural obligation; but it was available by way of defence or set off; if it was voluntarily performed, the debtor could not demand back his money on the

ground that it was not due and was paid by mistake. Again, if a person became surety for a *naturalis debitor*, he could be sued as surety, although the principal debtor could not be sued. A *naturalis obligatio* also was sufficient to support a mortgage; and it could be the foundation of the novation of a contract.

Sect. III.—Formal Contracts.

Nexum. The form of *mancipatio*, so extensively employed in the transfer of proprietary rights, was in certain cases, under the name of *Nexum*, employed as a mode of creating contractual obligations. In what cases it was used we do not certainly know: it applied undoubtedly to things that were dealt with by weight or by number, if the weight or the number was definite; and some jurists thought it applied to things that were dealt with by measure. In any case, it seems to have been narrow in its application. It was obsolete long before the time of Justinian.

Stipulatio. The *Stipulatio* was the chief Formal Contract. It may be traced back to a hoary antiquity; it survived in full vigour to the dissolution of the Roman Empire. It was an oral contract, and its peculiarity—its *form*—consisted merely in this, that the promise made must be in answer to a question. "Do you promise to give 10 *aurei*?" "I promise"—this constituted a binding contract. "I promise to pay you 10 *aurei*" created

no legal obligation whatever. The original form "Spondesne? Spondeo," was regarded as so peculiarly Roman that only Roman citizens could use it, and Gaius tells us that it could not properly be even translated into Greek. But other forms had to be found for the use of aliens (Fidepromittisne? Fidepromitto; Fideiubesne? Fideiubeo; Dabisne? Dabo; Faciesne? Faciam); and after Leo (A.D. 472) it was enough if the parties agreed in their understanding of the contract, whatever the words they used. Nor need the answer follow the precise terms of the question: it sufficed if there was substantial agreement. The *stipulator* was he that asked the question; the promiser (*promissor*) was the person bound by the answer. Thus to stipulate, in the Roman Law, does not mean to make a promise, but to ask for a promise: the stipulator was always the creditor.

Although the validity of a stipulation depended upon its being made orally, there was nothing to prevent, and much to recommend, the practice of recording the terms of the stipulation in writing. The Roman Law established two legal presumptions in favour of such a writing—(1) that, it afforded *prima facie* proof that the parties were present; and (2) conclusive evidence that the form of question and answer had been observed. The two weak points in the stipulation—the treacherous character of memory and all disputes

Stipulations reduced to Writing.

as to the observance of the proper form of question and answer—were thus fortified. On the other hand, as the *stipulatio* was a contract necessarily unilateral, it was not adapted for agreements involving reciprocal promises; but the parties might invert the rôle, and make reciprocal stipulations.

Cautio. In the time of Justinian there existed no contract made by the form of writing. A written acknowledgment of the receipt of money and of an obligation to repay (*cautio*) was in use, but it was not a literal contract. It was merely evidence of the existence of a debt, although evidence which, after the statutory period of two years, could not be called in question. During the Republic there existed a true literal contract, made by an entry in the ledger (*codex*) of the creditor. This entry constituted the contract—not merely evidence of it. It was most usually a novation of an obligation already existing (whence it was called *nomen transscripticium*): the debtor owes a number of payments (on sale, hire, &c.), and he allows his creditor to enter the total sum as money paid out to him (*a re in personam*); or else he may offer another person as debtor in his room, and then the creditor enters the amount of the debt as money paid out to the new debtor (*a persona in personam*). From this fictitious paying out the literal contract was called *expensilatio*. Long before Justinian the

Expensilatio.

codex had passed out of use (except among bankers). Gaius mentions the *chirographum*, a writing sealed by the debtor only, and the *syngrapha*, a writing executed in duplicate and sealed by both parties, as documents that were deemed to create a *litterarum obligatio*; but they were peculiar to aliens. For the Romans, *chirographum* at least was practically a *cautio*; and, if the *syngrapha* was ever really a literal contract, it can have had but little importance after Caracalla admitted all freemen of the Roman world to the citizenship. These two forms, as their names indicate, were of Greek origin: they were known by the Romans as early as the second Punic War (B.C. 210). *Chirographa. Syngraphae.*

SECT. IV.—PART PERFORMANCE.

In the contracts said to be made by acts (*re*, by the thing—by delivery of the thing), the legal obligation depended not upon the observance of any forms, but upon the fact that the plaintiff had performed his part of the contract. **Contracts re.**

Mutuum was the giving of any *res fungibiles* to another as his property, with the intention that at some future time we shall have returned to us, not the same things, but others of the same nature, quality, and quantity. *Res fungibiles* are things dealt with by weight, number, or measure, as silver, gold, bronze, money, corn, wine, oil: one *aureus*, or one bottle of Falernian wine, is as *Mutuum.*

good as another and serves the purpose (*fungitur uice*) equally well. *Mutuum* was thus a gratuitous loan. It carried no interest, unless an independent obligation was created by *stipulatio* for that purpose. A promise to lend could not be enforced; but if the things were actually lent, it would have been manifestly unjust not to compel the debtor to repay according to his promise.

Marine Insurance.

Pecunia traiectitia was a commercial loan partaking of the nature of insurance. It was money lent to buy merchandise that was to be shipped and to be at the risk of the lender until the goods arrived at the port of destination.

Loans to Sons.

By a statute passed (A.D. 69—79) in the reign of Vespasianus (*Senatus Consultum Macedonianum*), extending a similar enactment of Claudius (A.D. 47), an action was refused to any person lending money to a son in his father's power on the strength of his expectations on his father's death, unless it was made to procure necessaries.

Commodatum.

Commodatum was the gratuitous loan of anything not consumed in the use, and was thus the complement of *mutuum* (the loan of things consumed by use).

Duties of Borrower.

As a return for the gratuitous benefit of the loan, the borrower was bound to take all reasonable care (*exacta diligentia*) of the thing lent—that is, such care as would be taken by a prudent *paterfamilias*, and not merely such care as the borrower was accustomed to take of

his own property. If, however, the borrower used the thing in a different way from that bargained for, he was liable if the thing was lost, even without his fault; and might, indeed, expose himself to an action for theft. Thus, if Titius borrows plate from Gaius to use at supper, and takes it on a journey, and it is stolen by robbers, he is liable to repay it. The lender, on his part, having once given the thing to the borrower, but not before, is bound to suffer the borrower to enjoy the use of the thing according to the terms of the agreement. He must pay extraordinary expenses to which the borrower may be put, such as money spent on a sick slave, or to catch a runaway slave; the borrower paid ordinary expenses, as, for food, and even medical expenses, if they were slight in amount. Although the contract was gratuitous, yet good faith required that the lender should not knowingly give things for a use for which they were unsuited. If a man lent vessels to hold wine or oil, knowing that they leaked or would spoil the liquor, he was required to pay the value of the oil or wine thereby destroyed.

Duties of Lender.

Depositum was a contract in which a person agreed to keep a thing for another gratuitously, and to return it on demand. The depositor must pay all expenses incident to the custody of the thing, and make good any damage caused by it, if he knew that it was likely to cause damage.

Deposit.

The depositee was not allowed to use the thing, and for that reason he was not answerable for negligence (that is, if he took as much care of it as he was in the way of taking of his own property, and no more), but only for fraud. He might, of course, if he pleased, agree to answer for negligence as well. When a thing was deposited under distress, as from a riot, or fire, or fall of a house, or shipwreck (*depositum miserabile* or *necessarium*), the depositee, if he proved false to his trust, was liable like a thief to an action for double the value of the goods deposited.

Pignus. *Pignus* was reckoned by the jurists in the class of contracts. It has already been described under the head of Mortgage (p. 86).

Mandate. *Mandatum* is not reckoned among contracts *re* in the Institutes, but on principle it really belongs to that category—("Roman Law," pp. 482, 533). Mandate is a contract in which one person (*is qui mandatum suscipit, mandatarius*) promises to do or to give something, without remuneration, at the request of another (*mandans* or *mandator*), who, on his part, undertakes to save him harmless from all loss. A mandate might be for the benefit of the *mandans* or of a third person, but not exclusively, say the Institutes, for the *mandatarius* himself. Thus if Titius advised Gaius to invest his money in land rather than to put it out at interest, and Gaius, acting on the advice, lost

For good of Mandatory alone.

by the investment, he had no claim for an indemnity against Titius. Justinian says this is a piece of advice that Gaius was free to accept or not, rather than a mandate. The decision in this case is right, although the ground upon which it is put is not quite satisfactory. The true question is whether Gaius acted at the request of Titius, and Titius, in consideration of his doing so, promised him an indemnity. It would be contrary to common sense to suppose in such a case that Titius meant to indemnify him. When a man at the request of another acted for the benefit of some third person, it was reasonable to infer a promise of indemnity; but where a man was advised to do something solely for his own benefit, such an inference would be unreasonable. Nevertheless, if in such a case a person expressly promised an indemnity, a contract of mandate was established.

Examples of Mandate.

A mandate might be for the sake of the mandator, as when a man gives you a mandate to manage his business, or to buy a farm for him, or to become surety for him. It might be for the sake of a third person only, as when a man gives you a mandate to manage the business of Titius, or to buy a farm for him, or become surety for him, or lend him money without interest. It might be for the sake of the *mandatarius* and a third person, as when a mandate is given you to lend money to Titius at interest. It might be

for the sake of the mandator and a third person, as when a man gives you a mandate to act in business common to himself and Titius, or to buy a farm for himself and Titius, or to become surety for him and Titius. It might be again for the benefit of the mandator and the *mandatarius*, as when a man gives you a mandate to lend money to Titius for the good of the mandator's property; or, when you wish to bring to action against him as surety, gives you a mandate to bring the action against the principal at his risk. In all those and similar cases, where some person other than the *mandatarius* had an interest in the performance of the contract, it was considered that the request by the mandator implied a promise of indemnity, if the *mandatarius* should suffer any loss by acting upon the request.

The duties imposed upon the *mandatarius* may be reckoned as four:

Renunciation of Mandate.

(1) He must do what he undertakes. This duty was not, however, absolute. He might renounce the mandate, provided there was time for the mandator to act himself. If I undertake to go to an auction to bid for a farm for another, by giving reasonable notice before the auction I can relieve myself of the obligation. It must be borne in mind that the *mandatarius* acted gratuitously; if pay was promised to him, he could not withdraw—but such pay (*honorarium*, *salarium*) was

no element of the contract, and if it were, the contract was not mandate. Again, at the last moment, a *mandatarius* was excused from performing his engagement for good reason shown, as if he were suddenly taken ill, or compelled to leave home on business, or if the mandator became insolvent, or bad feeling arose between the mandator and the *mandatarius*. If the *mandatarius* failed without sufficient reason to perform his promise, he was made liable in damages, on the ground that the mandator had in consequence of the promise of the *mandatarius* not done something he would otherwise have done, and had thereby incurred loss.

Performance of Mandate.

(2) The *mandatarius* must conform to his instructions, on pain of forfeiting his indemnity, and exposing himself to an action for damages for any loss thereby falling on the mandator. Many nice questions arose as to what constituted a substantial fulfilment of a mandate, though not complying with its literal terms. In the early Empire Sabinus and Cassius had held that, if a mandate were given to buy a farm for 100 *aurei*, and 110 were given, the mandator could refuse to accept the farm even at 100 *aurei*; but the Proculeians thought he could not. Justinian took the view of the Proculeians—that the *mandatarius* could compel the mandator to take the farm off his hands at 100. Of course a mandate to buy at 100 was fulfilled by buying at a less

sum. A mandate to buy a farm was considered fulfilled by the purchase of one-half of it, unless the mandator expressly stated that he would accept nothing less than the whole.

Diligence. (3) A *mandatarius* must take as much care of any property he receives as a man of ordinary prudence (*bonus paterfamilias*). This forms a remarkable contrast to the contract of deposit, which, like mandate, was gratuitous; and it is an exception to the general rule that a gratuitous promisor is liable only for wilful default. This rule, it is not surprising, was not reached without a conflict of opinion.

(4) The *mandatarius* must give up to the mandator everything he acquires by the performance of the mandate, including all rights of action against third parties, and must permit the mandator to sue in his name. In this circuitous way the mandator was brought into relation with the third parties with whom contracts were made at his request; if he could have passed by the *mandatarius* and directly sued such parties as principal, the Romans would have enjoyed a true law of agency. In the absence of such, the contract of mandate afforded a very useful substitute.

Duties of Mandator. The duties of the mandator are (1) to pay the *mandatarius* what he has properly expended in executing the mandate; (2) to accept what the *mandatarius* has acquired or done for him, and

to indemnify him against all obligations that he has incurred in the execution of the mandate. As the *mandatarius* was to gain nothing, so he ought to lose nothing, provided always he properly performed the mandate.

A mandate might be revoked, or, as we have seen, renounced. It was also put an end to by the death of either mandator or *mandatarius*, subject to this qualification, that if the *mandatarius*, in ignorance of the death of the mandator, carried out the mandate, he was entitled to indemnification. It was not considered right that unavoidable ignorance should bring loss to the *mandatarius*. **Termination of Mandate.**

SECT. V.—SALE (*Emptio Venditio*).

Sale is a consensual contract—a contract formed by mere consent of the parties: delivery was not necessary (as in contracts *re*), nor a prescribed form (as in contracts *verbis* and *litteris*). This is by no means the oldest form of the transaction. Paulus remarks that sale followed upon exchange (*permutatio*): first, a man gave one thing and received another thing for it; by and by he received for it an equivalent in crude metal, later still in coined money, and the transfer of ownership was effected by the form of *mancipatio*. But a transaction of this sort gave rise to no obligations on either side—though obligations might arise otherwise in connection **Sale a consensual contract.** **Older expedients.**

with it. It required a long period of development before obligations *bonae fidei* were recognised to arise on sale by mere consent: probably this did occur before the Lex Aebutia (p. 206).

Sale how formed.

Sale (*emptio uenditio*) is a contract in which one person agrees to give to another for a price (*pretium*) the exclusive possession (*uacuam possessionem tradere*) of some thing (*merx*). This agreement might be made by the parties if present together, or by letter. It was held binding as soon as the subject-matter of the sale and the price were determined: the price need not yet have been paid, nor need earnest have been given. Writing was not essential to the validity of the contract; but, if it was contemplated by the parties that the negotiations for a sale should be finally reduced to writing, Justinian enacted that either party should be free to withdraw before the contract was written out. If the instrument was not written by the parties, it must be signed by the parties. If it was to be drawn up by a notary (*tabellio*), the contract was not complete until the documents were fully finished in every part. But one of the parties could not withdraw without penalty if earnest (*arrae*) had been given to bind the bargain, whether the contract was in writing or not: if the buyer refused to proceed, he forfeited the earnest; if the vendor, he had to restore the earnest and its equivalent in value.

"Arra" is a shortened form of "arrabo"=Greek ἀρραβών, which is derived from a Semitic word. The institution was an Eastern practice that came through Greece to Rome. The "arra" was a *pignus*: the term *pignus* was anciently used as an equivalent, or as a description of its function. It might be any convenient object whatever—often a ring; or it might be a deposit of part of the price. It formed no part of the contract: it constituted a collateral agreement. It might be given—usually by the purchaser—before the contract was concluded, as a "pledge" that he would proceed to conclusion; or it might be given after conclusion, as a "pledge" to carry out the contract—to pay the price, or to deliver the object, &c. It applied, anciently at least, to hire (if not also to other contracts) as well as to sale. Gaius speaks of it as a proof that a contract has been concluded (G. 3.137), and (which is the same thing) as a proof that the parties have agreed on the price (D. 18.1.35 pr.). Justinian probably intended simply to decide, where the parties themselves had neglected to arrange, what should become of the *arrae* on abandonment of negotiations or of the contract, whatever the particular object that the *arrae* were given to secure in connection with the contract before or after conclusion. But the doctors differ as to his meaning. Arra.

There must be a real price, and it must be coined money, and (except in part) no other species of valuable consideration. If a thing were sold for a nominal price (*uno nummo*), which the vendor did not mean to exact, there was no sale; but the price might validly be made less by way of favour to the buyer. Mere inadequacy of price did not vitiate the contract, unless it fell short of half the value, in which case, under a constitution of the Emperors The Price.

Diocletianus and Maximianus, the vendor could refuse to carry out the contract. It is a moot point whether, if the price were twice as much as the value, the buyer had a similar right to throw up the contract. If no price were fixed by the parties, but they agreed to allow a third person to determine the price, then if that person fixed a price, the contract was complete; but if he did not, the sale went for nothing, no price having been determined upon.

Vacua Possessio

In the definition of the contract, it is said that the vendor agreed to give the exclusive possession (*uacuam possessionem tradere*), which is to be distinguished from ownership. A man had exclusive possession when he was actually, by himself or his representative, in physical possession, and when no one was in a position to eject him by an interdict. I have elsewhere shown ("Roman Law," p. 362 *sq.*) that possession of this kind was practically ownership—the only form of ownership permitted by the Roman Law to persons who were not Roman citizens. In this circumstance is to be found the clue to the distinctive peculiarity, and, it may be added, distinctive anomaly, of the Roman law of sale. The real object of every sale, in Rome as in other parts of the world, was to give the ownership of the thing sold to the buyer, and yet a contract in Rome by a vendor to transfer the ownership of a thing (as distinguished from pos-

session) for a fixed price, was held *not* to be a contract of sale. The Romans accomplished the true end of sale by means that appear singularly cumbrous and inefficient. The vendor was bound actually to give exclusive possession, and he was bound also (eventually, the buyer being originally left to protect himself by stipulation) to warrant against eviction (*habere licere*), that is, to compensate the buyer in the event of his being evicted by law from a part or the whole of the thing sold, for any ground (*causa cuictionis*) existing at the time of the sale. The duty to transfer the ownership is thus split up into two parts—the duty to give present possession, and the duty to give compensation in the event of future disturbance. The two parts were not quite equal to the whole, because a buyer might be compelled to accept a property with a defective title, and before the eviction took place, the vendor might be bankrupt or dead, and an action against him for compensation be thus wholly worthless. But the Romans were content with this imperfection, for an all-sufficient reason. It was the only means whereby the law of sale could be opened to persons not citizens—the same cause to which is to be ascribed nearly all the profound changes in the form and spirit of the ancient laws of Rome.

Warranty against Eviction.

The effect of a completed contract of sale was, not to transfer the possession to the buyer, but to

Delivery of thing sold.

give the buyer the right to require the possession to be transferred. In the language of jurisprudence, it gave the buyer a right *in personam* as against the vendor, but no right *in rem* to the thing as against the world. If the vendor, in breach of his contract, kept the thing or transferred it to another person, the buyer could sue him for damages, but he could not recover the thing itself. Nor did even the delivery of the possession, in the case where the vendor was owner, vest the ownership in the buyer. The buyer became owner only when he had paid the price, unless the vendor had waived his right to immediate payment and given the buyer credit. In that case the buyer acquired the ownership as soon as the thing was delivered to him.

Periculum rei.

After the contract of sale and prior to delivery, it was the duty of the vendor to take good care of the thing sold, but the profit and the loss (*commodum* and *incommodum*) arising from it during this period were with the buyer. The interest of the buyer as owner thus really dated from the time of the contract of sale. If a mare foaled after the contract, the foal belonged to the buyer; if an inheritance were left to a slave after the price was fixed, the buyer had the benefit of it. On the other hand, if the property were accidentally destroyed or injured, the loss fell upon the buyer, and the vendor was entitled to the full price.

In three cases, however, the risk remained with the vendor. (1.) Things sold by number, weight, or measure remained at the risk of the vendor until they were set apart, numbered, weighed, or measured respectively—until they were "appropriated" to the buyer. The risk, however, was thrown on the buyer if these things were sold in lots (*per auersionem*), as, for example, "all that lot of corn, or oil, or wine." This was in fact the same as the sale of specific ascertained goods. (2.) If the sale were conditional, the rule was more complex. Of course, if the conditions were not fulfilled, there was no sale, and all loss or damage fell on the seller. If the conditions were fulfilled, but before that event the thing was destroyed or damaged, the rule was that a total loss fell on the seller, and a partial loss on the buyer. The reason was that, if the thing perished, the seller was not in a position to deliver anything to the buyer when the condition happened and the obligation took effect; but if he could deliver the thing, although damaged or mutilated, he acquitted himself of his promise. (3.) If the agreement were that the buyer had the choice of two things, and one perished, he took the other; but if both perished, the loss fell upon him, and he had to pay the price.

Except *res fungibiles.*

Except Conditional Sale.

Except Alternative Sale.

If the vendor did not deliver at the time he ought, he was responsible, not merely for negligence, but for accidental loss. On the other

Mora.

hand, if the buyer did not remove the goods at the time he ought, the vendor was answerable only for wilful misconduct, or for extreme negligence.

Duties of Vendor.

The duties of the vendor are these:—(1) To deliver exclusive possession; (2) to warrant against eviction; (3) prior to delivery, to take as much care of the thing as a good *paterfamilias* (*exacta diligentia*). There remains another and characteristic obligation, (4) the seller must suffer the sale to be rescinded, or give compensation, in the option of the buyer, if the thing sold has undisclosed faults that interfere with the proper enjoyment of it. This duty depended upon the edict of the Curule Aedile, a magistrate that (amongst other functions) was charged with the superintendence of markets. His edict applied to slaves and animals, moveables and immoveables. In the case of slaves, the edict applied if the slave had any disease or vice—was in the habit of wandering (*erro*), or was given to running away (*fugitivus*), or had committed a delict or a capital crime, or had attempted suicide, or been sent to the amphitheatre to fight with wild beasts as a punishment: and, unless any fault of that description was told to the buyer, he had the option of rescinding the sale (*actio redhibitoria*) within six months, or of keeping the slave and demanding a deduction from the price within a year (*actio aestimatoria*

Warranty against Secret Faults.

seu quanti minoris). In the case of animals, every disease or vice, as biting or kicking in a horse, or a disposition to gore in an ox, had to be disclosed. By analogy it was held that on the sale of a ship there was an implied warranty of soundness, and generally that, when an instrument was sold for a purpose, it was not so defective as to be unfit for that purpose. The buyer of land that produced poisonous herbs or grass could rescind the sale, unless the fault had been disclosed to him. The ignorance of the seller was no excuse; and, if he was not ignorant, he was guilty of bad faith and liable even for consequential damage.

English Law.

The rule of the Roman Law is exactly the reverse of that embodied in the maxim "*Caveat emptor.*" If both buyer and vendor were ignorant of a fault, the loss fell in Rome on the vendor, in England on the buyer. The origin of the Roman rule is to be sought in the slave market. The faults of slaves usually were or might be known to their owners, but could easily be concealed from buyers. It would have been a serious impediment to business if it had been as dangerous to buy a slave in Rome as a horse in England. Accordingly, long before the edict of the Aedile, a practice grew up of requiring from the vendors of slaves and cattle formal guarantees expressed in stipulations; and the Aedile simply extended that idea by creating an implied war-

ranty against all serious faults that were not expressly disclosed at the time of the sale.

Duties of Buyer.

The duties of the buyer in a contract of sale were simple. He must pay the price, he must accept delivery of the goods, and he must pay the expenses the vendor incurs in keeping the thing prior to delivery.

Sect. VI.—Hire (*Locatio Conductio*).

Hire defined.

Hire (*locatio conductio*) is a contract in which one person (*locator*) agrees to give to another (*conductor*) the use of something, or to do some work, in return for a fixed sum (*merces*). This contract is analogous to, but distinguishable from, several other contracts. It agrees with *commodatum* in being a contract for the use of a thing; but *commodatum* is gratuitous, while hire is for a remuneration. If a deposit is made gratuitously, or a service is to be rendered gratuitously, the contract is either deposit or mandate; but if payment is to be given, it is *locatio conductio*. Again, if there be a valuable consideration other than money, the contract is not *locatio conductio*. If, for instance, a man has an ox, and his neighbour too has one, and they mutually agree that each shall lend the other his ox free ten days in turn, then it is not a *locatio conductio;* but if one has lent his ox, he can claim the use of his neighbour's ox upon

Distinguished from other Contracts.

the ground of part performance by the *actio in factum praescriptis uerbis*. Although hire is very distinct from sale, yet there were cases in which a difficulty arose. Where Titius agreed with a goldsmith that the goldsmith should, out of his own gold, make rings, and receive 10 *aurei*, it was disputed whether this was a contract of sale or of hire. One view was that it was a compound contract—of sale as regards the material, and of hire as regards the services of the goldsmith. But it was finally settled that where the workman supplied the material, it was a simple contract of sale; if he supplied only labour, it was a contract of hire.

Hire of Things.

The contract of hire relates to land and other things, or to services. And first of the hire of things.

Tenant had no Right *in rem*.

A tenant of a house or farm had no right *in rem* to the house or farm, but only a right *in personam* against the landlord. In other words, if evicted by his landlord or even by a stranger, he could not invoke the aid of the interdicts by which possession was restored; he could only bring an action for damages against his landlord for breach of contract. The landlord alone could sue the disturbers, but, if he failed to do so, he committed a breach of contract—("Roman Law," pp. 341, 506).

Duties of Landlord.

The duties of the landlord (*locator*) were—(1.) To deliver the thing to the tenant (*con-*

ductor), and permit him to keep it for the time agreed upon. If the landlord by his own fault deprived the tenant of his holding before the end of the lease, he must pay full compensation (*id quod interest*); but if the tenant was evicted through no fault of the landlord, the tenant could claim only a remission of the rent, and not damages. Thus if the house was burned down, or the thing let was carried off by robbers, or the farm was confiscated, the tenant was released from rent, but was not entitled to compensation.

Landlord bound to Repair.

(2.) The landlord was bound to keep the thing in such a state that the hirer could enjoy the use agreed upon. If the thing deteriorated and was not repaired, the tenant could demand a reduction of the rent, or a release from the contract. Trifling repairs were to be executed by the hirer.

Warranty of Fitness.

(3.) The landlord was responsible if the thing let had such faults as were likely to cause damage. If a landlord let a farm along with the vats or jars used in wine-making, and the vats were rotten, and the tenant lost his wine, the landlord must pay the value of the wine.

Removal of Fixtures.

(4.) The landlord must permit the tenant to carry away not only moveables but even fixtures placed by the tenant, provided the tenant did not thereby injure the house.

Unexhausted Improvements.

A tenant of land was entitled to compensation for unexhausted improvements, except such as he had specially agreed to execute in consideration of a lower rent. The measure

of compensation was the increased value of the land.

Duties of Tenant.

The tenant was bound—(1.) To pay the rent, with interest if it was in arrear. If rent of a house or farm were in arrear for two years, the tenant could be evicted. In certain cases the landlord was obliged to remit the whole or a part of the rent on account of loss or damage to the crops.—("Roman Law," p. 509.) (2.) The tenant must occupy during the term agreed upon, or at all events pay the rent. (3.) The tenant or hirer must exercise the highest degree of care. He was responsible if the thing was stolen, but not if it was carried away by robbers. (4.) The tenant or hirer must give up the thing upon the expiration of the term agreed upon.

Hire of Services.

In the hire of services the jurists, misled by a false analogy, fell into confusion. The hirer pays the price, the letter gives his services. If the services were not rendered in respect of a particular thing, as the services of a messenger or secretary or domestic servant, the employer was correctly described as *conductor operarum*, and the servant as *locator operarum*. But if the work was to be done in respect of a particular thing, as by a jeweller, or builder, or tailor, or carrier of goods, tho jurists called the employer the *locator operis faciendi*—that is, of the job to be done—and the workman the *conductor operis faciendi*.

Duties of Workman.

The servant or workman was bound—(1) to do the work properly in the manner agreed upon; (2) to take good care of the things entrusted to him, and to pay their value if they were lost or injured through his negligence or unskilfulness. The employer, on the other hand, was bound to pay the wages agreed upon.

Jettison.

JETTISON (*Lex Rhodia de Iactu*).—An interesting case of hire was that of a carrier of goods in ships. The customs known as the maritime law of Rhodes were accepted as law by the Romans when they did not conflict with special legislation. Jettison was where, in order to save a ship, a portion of the cargo was thrown overboard. The loss was divided between the owners of the goods lost and the owners of the vessel and of the cargo saved. The owner of the vessel was also entitled to contribution when a mast was cut to save the vessel, but not for repairs of damage done in a storm in the course of the voyage, although the repairs were necessary to enable the vessel to continue the voyage. The owners of the goods lost had no direct action against the owners of the goods saved; but they could sue the shipmaster on the contract of hire for the purpose of requiring him to keep the goods until the contribution was paid; or, if these had been delivered, to allow them to sue the owners of the goods in the shipmaster's name.

Sect. VII.—Partnership (*Societas*).

Partnership (*societas*) is a contract in which two or more persons combine their property, or one contributes property and another labour, with the object of sharing amongst themselves the gains. There cannot be a partnership in which one partner contributes nothing—neither property nor labour. A partner might share in the profit and not in the loss, but a partner could not share in the loss only and not in the profit. Such a partnership (*leonina societas*) could be made only from a charitable motive; and it was necessary in this contract that there should be a valuable consideration moving from each of the partners. **Partnership defined.**

A profound difference is to be remarked between partnership in the Roman Law and partnership in modern systems of law. The most important aspect of partnership is the relation between the partnership and third parties that enter into transactions with any of the partners. In modern systems every partner within the scope of the business is an implied agent of the other partners, and can bind the assets of the partnership. In Rome this was wholly wanting. The Roman law of partnership deals only with the claims of partners as between themselves. The *actio pro socio* has no wider scope; and third parties had **Roman and Modern Law.** **Partners not implied Agents.**

no direct remedy except against the individual partner with whom they contracted.

Shares of Partners.

Partnership was formed by the simple consent of the parties. If nothing was said as to the shares of the partners, they took equal shares. If the share was expressed in one case only, whether of profit or loss, but omitted in the other, then in the other case that had been passed over the same share must be kept to. By express agreement, however, the shares of loss might be different: thus one partner might have two-thirds of the profit and one-third of the loss, and the other partner one-third of the profit and two-thirds of the loss. As in the case of Sale and Hire, the determination of the shares might be left to a third party.

Dissolution of Partnership.

Partnership was ended—(1.) By renunciation. Any partner might dissolve the partnership if no time was fixed for its duration, and if he did not act with a view to appropriate to himself what would otherwise have fallen into the partnership estate. A partner that withdrew without justification divested himself of all his rights as a partner, but remained liable for all existing obligations (*socium a se, non se a socio, liberat*). (2.) By the death of a partner; because, in entering into a contract of partnership, a man chooses for himself determinate persons as his associates. Even if the partnership was formed by more than two persons, the death of one dissolved it

although several survived, unless it was otherwise agreed when they joined in partnership: in a *societas uectigalium* (p. 142) it was often specially arranged that the heir of a partner should succeed him. (3.) By the loss of liberty or citizenship by any partner. (4.) The bankruptcy of one of the partners, or the confiscation of all his property, dissolved the partnership. But in this case, if the members agree to go on as partners, a new partnership is begun. (5.) A partnership is at an end when it was formed for some special business, and that business is finished. Again, a partnership is terminated—(6.) By the loss of the partnership property; (7.) By the lapse of time for which it was formed; and (8.) By one of the partners commencing an action to enforce his rights.

Kinds of Partnership.

Five kinds of partnership were distinguished—(1.) Trade Partnership (*Societas uniuersorum quae ex quaestu ueniunt*); such as that of bankers or money-lenders. This was the partnership understood to be made, if no other form was specially agreed upon. The partners contribute definite property, and they divide the profits arising from it according to their shares.

(2.) Partnership for a single transaction (*Societas negotiationis alicuius*), as when one person contributes three horses to a team and another one, in order by selling them together to realise a higher price.

(3.) *Societas uectigalium*—a partnership between persons farming the taxes.

(4.) *Societas unius rei uel certarum rerum*, or joint-ownership, is not a partnership, but was considered under that category, because where joint-ownership had originated by agreement between two persons (but not otherwise, *e.g.*, by inheritance or legacy), they could employ the *actio pro socio* for an account as between them.

(5.) *Societas uniuersorum bonorum* resembles the Hindoo institution of the joint family. It means that two persons agree to have a common purse. All that they have and all that they acquire, from whatever source, becomes joint-property, and they are entitled to have all their debts and expenses paid out of the common fund.

Duties of Partners.

The reciprocal rights and duties of partners were few and simple. (1) Each must contribute what has been agreed upon, and whatever he gains in respect of partnership transactions. (2) Each is entitled to be reimbursed all expenses properly incurred, and to be indemnified in respect of all the obligations he undertakes on behalf of the partnership. (3) Each partner is liable for wilful default (*dolus*), but not for negligence in the ordinary sense. It was enough that a partner displayed such diligence and care in regard to the partnership concerns as he usually did in regard to his own. This was decided on a ground that would equally apply to

Culpa.

all contracts whatever—that a man who takes to himself a partner lacking in diligence has nobody to complain of but himself.

Sect. VIII.—Extinction of Contracts: Novation.

Contracts were extinguished (1) by actual performance (*solutio*) or its equivalents; (2) by release; (3) by prescription; (4) by suit (*litis contestatio*); and (5) by merger (*confusio*).

Performance.

1. *Solutio*.—Every obligation may be discharged by the giving of what is due, or, if the creditor consents, of something else in its place. It matters not who discharges it, whether the debtor or someone else for him; for he is freed even if someone else discharges it, and that whether the debtor knew it or not, and even if it was done against his will. If, without the fault of the promisor, it becomes impossible to fulfil the promise, generally the promisor was discharged. A promises by stipulation to give a small plot of land, not his own, to another. Before doing so, the owner of the ground buries a dead body in it, and so makes it *res religiosa* and *extra commercium*. A cannot be compelled to pay damages for non-performance.

Formal Release.

2. Release is of two kinds—formal and non-formal. The Roman Law started with the idea that no debtor could be released except by a reverse application of the proceeding by which

he bound himself (*Nihil tam naturale ĕst quam eo genere quidque dissoluere quo colligatum est.*—D. 50, 17, 35.) Hence a contract of *nexum* made by *mancipatio* must be dissolved by *mancipatio*; a contract by stipulation must be dissolved by stipulation (*acceptilatio*); a contract formed by writing (*expensum ferre*), by written release (*acceptum ferre*). This rule, founded on a false analogy, was inconvenient, and an ingenious device was introduced by Aquilius Gallus, a colleague of Cicero's in the praetorship, B.C. 66. If by an existing contract a person was bound to do or give anything, and he afterwards by stipulation promised to do or to give the same thing, then the original contract was considered at an end, and its place taken by the stipulation, upon which alone henceforth the promisor could be sued. Taking advantage of this peculiarity, Aquilius introduced a general form (*stipulatio Aquiliana*) embracing every kind of obligation, and converted all these obligations into a single stipulation. Then, under another stipulation, the creditor released this obligation, and thus all the obligations of one person to another could be discharged at a single stroke.

Aquilian Stipulation.

By a formal release, the legal tie (*uinculum iuris*) was broken. If there were sureties, they were *ipso facto* released; if the release was made to one of several co-debtors, all were immediately free. At first the Roman Law recognised no

Non-formal Release.

release from a formal contract except a formal release. But at length the Praetor interfered to protect a debtor that his creditor had agreed to acquit, but without observing the appropriate formalities. If a creditor agreed not to sue, it was against good conscience to allow him afterwards to molest the debtor. The Praetor gave effect to such an agreement (*pactum de non petendo*) by refusing to the creditor his legal remedy. This was not quite the same thing as a release. A formal release wholly extinguished the obligation for every purpose; an agreement not to sue might operate in favour of some of the parties and not of others; it might be subject to conditions; everything depended on the terms of the agreement. Thus, in the case of a suretyship, *a release by acceptilatio of either principal* or surety put an end to the suretyship; but an agreement made with a surety did not create even a presumption in favour of the release of the principal, although an agreement not to sue the principal was *prima facie* an acquittance of the surety. The reason was that, if the surety were called on to pay, he would have his indemnity from the principal, who would thus in the end derive no benefit from his acquittance.

Pact not to sue.

3. *Statutes of Limitation.*—No general statute of limitations for obligations was introduced until far down in the Empire, by Theodosius, in A.D. 424. Actions derived from the *jus ciuile* were

Prescription.

perpetual, and so strong was the idea of an obligation as a chain (*uinculum*) that the Romans had some difficulty in conceiving the possibility of its being unloosed except by the proper legal key. No such difficulty affected the Praetor. When he interfered in derogation of the civil law, his action was always regarded as an extraordinary stretch of power, fully justified and required by natural justice, but still anomalous. Penal actions created by the Praetor must be brought within one year; but actions brought for the recovery of property were perpetual. In the latter, as in most other cases, the statutory period of limitation in the time of Justinian was thirty years.

4. When an action was commenced and had gone so far as to be referred to an *arbiter* or *iudex* (*litis contestatio*), the obligation was gone.

5. Before the change in the law introduced by Justinian, if an heir was either debtor or creditor to the person he succeeded, then as the heir and the deceased were in law regarded as one person the debt was extinguished (*confusio*).

Novation defined.

NOVATION.—In its most general sense, *novati* means any change in the form or in the parties to an obligation. Thus if A owes 10 *aurei* to I we may have three principal changes:

(1) B may transfer his right to C. A will then be debtor to C.

Or (2) B may accept D as his debtor in place of A. D will then owe the 10 *aurei* to B.

Or (3) while A and B remain the same, the simple debt of 10 *aurei*, arising, for example, from a sale or loan, may be changed into a sum due by stipulation.

Transfer of Claims.

A creditor could, without the consent of the debtor, transfer his right to a third party. Upon giving notice to the debtor, the new creditor could in his own name bring an action for the debt, subject to the right of the debtor to set up against him whatever defence he had against the original creditor. To prevent debtors from being too much harassed, the law, in the time of Justinian, was that a transferee of a claim could not receive more than he paid for it with interest.

Delegation.

When, by the consent of the creditor, a new debtor was substituted for the old, *delegatio* was said to take place. The creditor stipulated with the new debtor for the debt, by which means the old obligation was taken away. Justinian made a very important change in the law on this point. The principle of the Roman Law was, that it depended entirely upon the intention of the parties whether a new stipulation for the same object as an existing obligation took away that obligation or not. But a number of presumptions were introduced as to the circumstances in which such an intention was to be inferred.

Change by Justinian.

Justinian removed all doubts by enacting that

there should be no novation unless it was expressly declared by the contracting parties that such was the aim of their agreement. If not, both the original and the new obligation remained in force.

Merger.

Again, while the parties to a contract remained the same, the form of their contract might be altered. The common case was the merger of an obligation by making a *stipulatio*. The enactment of Justinian just stated applied to this case as well as to *delegatio*.

Sect. IX.—Suretyship.

Contracts of Suretyship.

When one person undertook to answer for the debt or obligation of another, whether as his substitute by novation (*expromissor*), or in addition to him (*adpromissor*), he was said to be an *intercessor*. The contract of suretyship could be made by stipulation (in three forms), by mandate, and by the *pactum de constituto*. Earliest in point of time are the forms of suretyship by stipulation. The oldest of all (*Sponsio*) could be made only by Roman citizens, and only as ancillary to a debt created by stipulation. *Fidepromissio* (so called from the words used, *Fidepromittis? Fidepromitto*) was likewise ancillary to stipulations, but it could be made by aliens as well as by citizens. Both forms were obsolete in the time of Justinian: they had been long replaced by *fideiussio* (from the words

Sponsio.

Fidepromissio.

Fideiussio.

Fidciubes? Fideiubeo), which could be annexed not merely to stipulations but to every species of obligation, whether natural or civil. By mandate also, without *stipulatio*, a suretyship could be constituted. Thus, if Titius, at the request of Gaius, lent money to Maevius, an obligation upon Gaius was implied to make good the amount if Maevius failed to repay it. Thus Gaius was a surety. Necessarily, however, such a liability could arise only in respect of future debts, incurred by the creditor on the faith of the mandate. If the debt actually existed, and the creditor pressed for payment, anyone who promised to see the debt paid, in consideration of the creditor's forbearing to sue, became a surety. Such an agreement was called a *pactum de constituto*.

Mandate.

Pactum de Constituto.

Women were prohibited by the *Senatus Consultum Velleianum* (A.D. 46) from undertaking to answer for the debt of others, whether as sureties or as substitutes (*expromissores*). Custom refused to women not only offices of state, but business duties, which imply their going into the company of men away from their own homes. They were therefore prohibited from undertaking gratuitous responsibilities, and exposing their property to danger. The terms of the enactment were sweeping: it forbade every woman to make any contract or give any of her property as security on behalf of any person (even a husband, son, or father) to

Women not Sureties.

any creditor. An *intercessio* by a woman was wholly void.

Debtor to be sued before Surety.

According to the law as it stood in the time of Justinian, the surety could not be sued until the principal debtor had made default (*beneficium ordinis*), except in the case of bankers, who had the option of suing the surety first. If the principal debtor was beyond the jurisdiction, and could not be sued, the surety was allowed a reasonable time to bring him into court, and, if he failed, could himself be sued in the first instance. The creditor, if he compelled the surety to pay, must surrender to him every mortgage or pledge that he had in respect of the debt. In the event of the surety being required to pay, he was entitled to sue the principal debtor to repay him the amount. His remedy was the *actio mandati*.

Contribution between Co-Sureties.

Co-Sureties.—Before the time of the Emperor Hadrianus there existed no kind of right to contribution between co-sureties (*fideiussores*), where one only had been sued for the whole of the debt. A surety when sued could object to pay unless the creditor first transferred to him his rights of action against the other sureties (*beneficium cedendarum actionum*). But Hadrianus introduced a species of contribution (*beneficium divisionis*). The surety that was sued could require the creditor to divide his claim among the

sureties that were solvent at the time issue was joined in the action. If any of the sureties were insolvent, the burden upon the rest was increased. But if the surety neglected to claim the privilege of division, and the creditor obtained the whole amount from him, there was no right of contribution against the co-sureties.

SECT. X.—QUASI-CONTRACT.

Implied Contracts.

English lawyers distinguish between express and implied contracts. Under the name of implied contracts are included many true contracts, when the consent of the parties has not been expressed but may be reasonably inferred; but other obligations are included that are not based on the consent of the parties, and are not contracts at all. The term "quasi-contract" might conveniently be borrowed from the Roman Law as a name for those obligations, or rights *in personam*, that are not derived from the consent of the parties, but are imposed by law regardless of their assent or dissent. The chief examples in the Roman Law are the *Condictio Indebiti* to recover money paid by mistake, and the *actio negotiorum gestorum*.

Money paid by Mistake.

Money not due paid under a mistake of fact could be recovered, but, as a rule, not money paid under a mistake of law. If the money were a debt of honour (*naturalis obligatio*) and voluntarily paid, it could not be demanded back,

Money paid by order of a court is not money paid by mistake, even when the order is wrong. So money paid to avoid the risk of a penalty is not considered as paid by mistake. The general rule was that a person was to suffer from ignorance of law, but not from ignorance of fact. The reason assigned was, that the law is, or ought to be, knowable; but the most prudent man cannot know everything. The ground upon which the Roman jurists placed the distinction seems to rest upon the idea of negligence, so that a man could not plead ignorance of a fact that was well known to everybody but himself. Minors under twenty-five, women, soldiers, peasants, and some others were not made responsible even for ignorance of law.

Ignorance of Law and Fact.

Negotiorum gestio is to be compared with mandate. To act on behalf of another at his request was mandate; to act for him without his knowledge or request was *negotiorum gestio*. This was introduced for public convenience, lest when men were forced to hurry away suddenly, and went from home without giving any one a mandate to look after their affairs, their business should be neglected. No one, under such circumstances, would attend to the interests of the absent if he had no action to recover what he spent. The *negotiorum gestor*, although he acted gratuitously, yet interfered voluntarily, and was bound to act with the care of a good *pater-*

Negotiorum gestio.

familias; it was not enough to use the diligence he ordinarily displayed in his own affairs.

Sect. XI.—Delicts.

Delicts or wrongs may be against the person or against property. In the Roman Law this distinction is very emphatic. A wrong to the person was an *iniuria*; harm done to property was *damnum iniuria*, and a wrong to a person's interests by carrying off his property was *furtum*, or, if violence was used, *rapina* (or *ui bona rapta*). Division of Delicts.

Iniuria is when a person, either intentionally or by negligence, violates any right that a free man has in respect of his own person. It thus includes a multifarious variety of wrongs, as striking or whipping a man; kidnapping or falsely imprisoning him; reviling a man in public (*conuicium facere*); defaming a man either by words or writing, or even by acts. Thus it was defamation to take possession of a man's goods as if he were insolvent, when in fact he owed nothing. Again, it was an *iniuria* to enter a man's house against his will, even to serve a summons. Attempts directed against chastity, and the administration of love-philtres, were *iniuriae*. *Iniuria.*

An assault was not an *iniuria* if committed in self-defence. When one's life or limb was threatened, any amount of force reasonably necessary to repel the injury—but no more—was law- Self-Defence.

ful. A man put in fear of his life could with impunity kill his assailant; but, if he could have caught the man, and there was no necessity for killing him, he was not justified. In defence of property less latitude was allowed. Even a burglar could not be lawfully killed, if the householder could spare his life without peril to himself. Any less violence, however, was justifiable in defence of property.

Aggravated Injury.

An *iniuria* was held to be aggravated (*atrox*) by considerations—(1) of the nature of the act, as when a man is wounded, or scourged, or beaten with sticks; (2) of the place, as when the assault is in a public assembly; (3) of the person, as when parents are struck by children, or patrons by freedmen; (4) or of the part wounded, as a blow in the eye. In these cases exemplary damages were given.

Slaves and *Iniuria*.

There could be no *iniuria* to a slave. A slave was susceptible of damage, of depreciation as a money-making machine (*damnum iniuria*), but not of *iniuria*. In two ways, however, a more humane doctrine was established. First, it was held that whipping a slave was a constructive insult to the master, whose exclusive privilege it was to flog his own slave; and thus, although the slave was not injured, the master could sue for the insult to himself. Again, when the injury was severe, the Praetor granted an action to the master, even when from the circumstances there

could have been no intention to insult the master. In the case of persons under *potestas*, the rule was that they could suffer *iniuria*, but only their *paterfamilias* could, except in certain rare cases, sue for the injury. The *paterfamilias* sued both on his own account and his son's, and was entitled to damages on both grounds. In like manner, a husband sued for *iniuria* done to his wife.

Filii-familias.

Wives.

Wrongs to property are to be distinguished in the Roman Law in the case of moveables and immoveables by the nature of the respective remedies. A right to a moveable may be violated in several ways: first, by depriving the owner of possession, and that either by stealth (*furtum*) or by violence (*ui bona rapta*); and, secondly, without depriving the owner of possession, by damaging his property, and impairing its usefulness (*damnum iniuria*).

Division of Wrongs to Property.

Theft is defined in the Institutes of Justinian to be "the dealing with an object, or with its use, or with its possession, with intent to defraud. To deal fraudulently with the use or possession of a thing in a manner not permitted by the owner was theft. Thus if a creditor, who is entitled merely to the possession of the thing pledged, used it; or if a person with whom a thing was deposited merely for custody, used it; or if a person borrowed a thing for one purpose and used it for another—in all those cases the parties were guilty of stealing the use (*furtum*

Theft: its Kinds.

usus), unless they believed honestly that the owner would not object to what they did, or unless, even if they did not so believe, the owner in fact did not object. If an owner that had pledged a thing carried it off secretly from the creditor, or if an owner, finding his own lost property in the lawful possession of another, surreptitiously took it away, the owner was said to steal the possession of the thing (*furtum possessionis*). When a person attempted to seduce a slave to steal his master's property, and, in order to catch the tempter, the master allowed the slave to carry some goods to him, the old jurists were in great perplexity whether an *actio furti* could be brought against the tempter or even an *actio serui corrupti*. For the owner had consented to the removal of the goods, and one cannot steal what the owner is willing for one to take; and the slave had not been corrupted, for he went straight and told his master. Justinian brushed aside "such subtlety," and declared that both actions should be brought against the tempter.

Theft from Persons interested.

An action for theft could be brought not merely by owners, but by any one who, in consequence of being responsible for the loss of anything, was interested in its safe custody. Every person who was under a legal obligation to take care of any property was considered in fault if the thing was stolen. Thus, if a fuller or tailor takes clothes to be cleaned and done up or to be mended for a

fixed price, and they are stolen from him, it is he, and not the owner, that can bring the action for theft. The owner had no interest, as he could sue the fuller or tailor for the value of the things stolen. But if the fuller or tailor were insolvent, the owner was allowed to sue the thief. Hirers.

A similar rule prevailed in the case of gratuitous loan (*commodatum*) till Justinian altered the law. Justinian gave the owner an option of proceeding either against the borrower or against the thief. If the owner knew that the thing was stolen, and commenced an action against one, he was not allowed to stop that action and sue the other. He had made his election. If, however, he began an action against the borrower in ignorance of the theft, he was allowed to give up his claim against the borrower and to proceed against the thief. If the thief were solvent, there was an advantage in suing him, as he was liable to a penalty of double the value of the thing stolen. In the case of a gratuitous deposit, the person with whom the thing was deposited was not answerable for negligence, and therefore not for loss by theft. Accordingly in this case the owner, and not the depositee, had the action against the thief. Borrowers. Depositees.

In the Roman Law, theft was treated as a mere civil wrong subjecting the culprit to an action for penalties; not even in the latest times, except in a few aggravated cases, to punishment as a Criminal Thefts.

criminal. Cattle-stealing, burglary, housebreaking, stealing from public baths, or from a house on fire, were punished criminally; but in ordinary cases the thief was exposed merely to a civil action. The penalties varied according to an ancient and curious rule. If the thief was caught in the act (*furtum manifestum*), the penalty was fourfold the value of the thing stolen; if he were not (*furtum nec manifestum*), the penalty was twofold—besides, in either case, restitution of the stolen property. Many subtle questions were raised upon this distinction: Justinian decided that it was manifest theft so long as the thief was seen or taken in possession of the stolen goods by any one before he reached the place where he meant to carry them and lay them down.

Civil Penalties.

Not only the thief, but any one that aided and advised the thief (*ope et consilio*), was liable to an *actio furti*. Mere advice and encouragement was not enough: there must be some overt act of assistance, as placing a ladder under a window for the thief to enter, or lending him tools to break open the house.

Aiding and Abetting.

In the case of robbery (*actio vi bonorum raptorum*) the penalty was fourfold if the action was brought within a year; after a year, only the single value could be recovered. The fourfold penalty included the recovery of the thing taken. The rules relating to robbery are but a repetition

Robbery.

of the rules applicable to theft. But at this point Justinian notices the distinction between robbery and the violent seizure of goods under a claim of right. By statute (A.D. 389) it was established that if an owner forcibly reclaimed his property, whether moveable or immoveable, he should forfeit it to the person from whom he took it; and that, if a person, not owner, but thinking himself owner, did so, he should restore the property, and then pay its value. This rule was maintained by Justinian. **Claim of Right.**

The law relating to wrongful damage to property (*damnum iniuria*) rests on the provisions of a plebiscite, known as the *Lex Aquilia*, carried by Aquilius, a tribune of the plebs, perhaps *circ.* B.C. 286. This law abrogated and superseded the provisions of the earlier law, including the XII Tables. It was not a scientific enactment; it distinguished only two classes of injuries, each characterised by a distinct and arbitrary measure of damages. The first class was the killing of a slave or four-footed beast reckoned among cattle. The penalty was the highest value that the property bore within the year preceding. All other damage to slaves, animals, moveables or even immoveables, was included in the second category, and the measure of damages was the highest value within the thirty days preceding the injury. If the defendant denied his liability, and was condemned, he had to pay double damages. ***Damnum iniuria.***

The enactment, as it was drawn, made no provision for indirect injuries. Thus to throw a stone at a horse and hurt him entailed liability; but to lay down a stone and trip a horse was not visited with damages. This defect was remedied by the Praetor. The statute gave an action only when the damage was done to a body by a body (*corpore corpori*); but the Praetor after the analogy of the statute gave a remedy when the damage was done not directly by the body (*non corpore sed corpori*), and even when no damage was done to the thing itself (*nec corpore nec corpori*). In the first case, the action was said to be *utilis*; in the second case, an *actio in factum*, as it was called, was granted. Thus if I shut up another man's slave or cattle, and starve them to death, or drive a beast so furiously as to founder it, or terrify cattle to rush over a cliff, or persuade another's slave to climb a tree or go down a well, and he in climbing or going down is either killed or injured in some part of his body, then against me an *actio utilis* is given. If, on the other hand, a man thrusts another's slave from a bridge into a river, and the slave is drowned, then he is directly liable within the words of the statute, as it is with his body he did the damage. If, again, a man moved by pity frees another's slave from his fetters to release him, he damages the master's interests, but not the body of the slave;

Direct and Indirect Damages.

and for such cases provision was made by the *actio in factum*.

To support an action under the *Lex Aquilia*, however, it was essential that there should be not merely harm (*damnum*) but wrong (*iniuria*). The damage, to be actionable, must be done either intentionally or by negligence. What constituted negligence depended upon circumstances. Two cases are cited in the Institutes. A man playing with javelins kills a slave passing by. Is he liable? If he was a soldier practising in the Campus Martius, or in any other place set apart for soldiers' practice, that did not imply negligence; but if any one else, or a soldier elsewhere, did so, the striking would *prima facie* amount to negligence. Again, if a pruner, by breaking down a branch from a tree, kills your slave as he passes, near a public road or path used by neighbours, and he did not first shout and warn the slave, he was guilty of negligence. If, on the other hand, the place was quite off the road, or in the middle of a field, he was not liable for negligence, even if he did not shout. Want of skill was considered equivalent to negligence for the purpose of the *Lex Aquilia;* as, for instance, when a doctor kills a slave by bad surgery or by giving him wrong drugs. So if a rider or a muleteer runs over a slave, he is chargeable with negligence if the damage resulted from

Negligence.

Want of Skill.

want of skill, or even from want of the strength of an ordinary man.

Measure of Damages.

In estimating the compensation due to the owner, it was not the present value of the slave or thing killed or damaged that was taken as the basis of calculation, but the highest value within the preceding year or month; and so it might be more than the present value. Again, the actual value of the object by itself merely might not represent the loss accruing to the owner from its deterioration or destruction. Thus, if one of a pair of mules or of a team of horses was killed, or one slave out of a band of comedians or singers, the reckoning includes not merely the animal or person killed, but in addition the depreciation in value of the rest. So, if a slave that is killed has been appointed heir to a man whose estate is worth 1000 *aurei*, and by his death the inheritance is lost to his master, then the damages include, in addition to the value of the slave, 1000 *aurei*.

Torts to Land.

Immoveables, in regard to wrongs, are in a different position from moveables. Immoveables cannot be stolen; and, if a possessor is wrongfully ejected, the law can actually restore his property, and not merely give him an equivalent in damages. In the Roman Law, the remedy for wrongful ejectment was not technically called an action, but an interdict (*Interdictum de ui et ui armata*). Every injurious act done to an

immoveable without the consent (*clam*) or against the will (*ui*) of the owner, exposed the offending party to the interdict *Quod ui aut clam*, by which he was compelled to pay the expenses of undoing the mischief. *Clam, ui.*

QUASI-DELICTS.—The wrongs above enumerated alone were called delicts; other wrongs were said to arise *quasi ex delicto*. In this case the prefix *quasi* indicates merely that the wrongs so described did not attract the attention of the law until a comparatively late period, when the denotation of "*delictum*" was fixed by usage. Between a delict, therefore, and a quasi-delict there was no real distinction. The quasi-delicts mentioned in the Institutes may be briefly noticed. **Quasi-Delict.**

If a *iudex* gave a corrupt decision, or gave a decision beyond the terms of the reference, he was liable to an action for damages at the suit of the injured party. **Wrong Judgment.**

The occupier of a house was liable (*dupli quanti damnum datum sit actio*) for damages done to any one by anything thrown out or poured down from the house, although the mischief was done not by the occupier himself, but by some one else. *Deiectum Effusumue.*

Persons who kept anything so placed or hung that it might, if it fell, do harm to a person *Positum suspensumue.*

passing by, were subject to a penalty of 10 *aurei*, even if no one was hurt.

Edict Nautae, Cauponae, etc.

A master of a ship was liable for any loss by theft or damage to any goods in the ship through the misconduct of the sailors employed in the ship. The same responsibility attached to inn-keepers and livery stable-keepers for goods left in the inn or in the stables.

CHAPTER V.

THE LAW OF INHERITANCE AND LEGACY.

Sect. I.—Testamentary Succession.

The Will.

The subject we now approach may be regarded as at once the most interesting and the most tedious branch of Roman Law. In its broader aspects, it supplies a fascinating chapter in the history of thought; but to enter into all the detail that we find even in the Institutes would not be very instructive, and would certainly be dull. The great central fact is that the idea of a testamentary disposition of property, which, but for the plain teaching of history, we should consider of the very essence of ownership, was reached by slow and tortuous steps.

Contrast of Ancient and Modern Will.

Sir Henry S. Maine has drawn attention to the sharp contrast between a modern will and the ancient Roman mancipatory will. The modern will is a secret document; it is revocable during life, until the termination of which it has no effect. The old will of the Roman Law was a conveyance *inter vivos*, made openly in the presence of a

number of witnesses; it took effect at once, and it was irrevocable. But that is not all. The purpose of a modern will is to divide property: the testator stands face to face with the legatees; an executor is appointed merely for convenience in winding up the estate. The primary purpose of a Roman will (even in the time of Justinian) was to appoint an executor—in other words, a universal successor to the deceased; if it failed in that, it was wholly worthless. From the legal standpoint, the nomination of the executor was the whole object of the will. That which in the real purpose of the modern testator is the first and paramount object—the distribution of his property—was in the eyes of the ancient Roman law a secondary and quite subsidiary point. Nothing can be more puzzling to a student than the wholly inverted manner in which, according to modern ideas, even the most recent productions of the Roman intellect deal with the subject of wills and legacies. To understand how this came about is to master nearly everything that is of interest in this department of Roman Law.

Hindoo Heirs.

The earliest notions of succession to deceased persons are connected with duties rather than with rights, with sacrifices rather than with property. In the Hindoo Law, the heir or successor is the person bound to perform the funeral rites required for the comfort of the deceased's soul; and even in the Roman Law there are not want-

ing indications of the same fact. The property of the deceased was the natural fund to provide the expenses, in some systems of religion by no means inconsiderable, of the necessary religious ceremonies. In the Roman Law, until the change, presently to be stated, made by Justinian, the heir was considered to stand in relation to third parties as more than a representative of the deceased—indeed, as actually continuing his legal personality. The heir succeeded to all the rights and all the liabilities (*in universum ius*) of the deceased; and, just as a person is not excused from paying his debts because he has insufficient means, so it was no answer to a creditor, when suing an heir for money due by the deceased, that the deceased had not left him funds wherewith to discharge his debts. Up to the alteration of the law by Justinian, *the heir was bound to pay all the debts of the deceased, even if he obtained no property from him whatever.* An insolvent' inheritance was thus a veritable *damnosa hereditas.*

Universal Succession.

The history, not of Rome alone, but of other nations, shows that in the earliest times the heir was the person designated by nature to perform the duties of filial piety to the deceased. The children, or, failing them, the more distant kindred, were the only successors dreamt of by the men who made the institutions of the Indo-European family. But children and kin some-

Intestate Succession most Ancient.

times fail. To persons actuated by the ideas and feelings of a modern European such a circumstance would not be considered as an evil of a grave order. Far otherwise was it with men that devoutly practised the worship of ancestors, who believed that the spirits of their fathers (*manes*) hovered around the household hearth, and required such nourishment as could be derived from the food sacrificed to them. To die childless was to leave the perturbed spirit of the father without rest or food: from being the natural protector of his house he became a malignant ghoul. The records of ancient law show many traces of the absolute horror with which the fathers of our race contemplated their disconsolate state if they died without children, and by consequence without heirs.

Adoption. The ingenuity of men first provided in the fiction of adoption a remedy for this emergency. A man that had no child was allowed to select a son. When in the course of nature he died, this artifice provided him with an heir. It is a disputed question whether the Hindoos ever advanced nearer to a law of testamentary succession than this rude device; and it is a significant fact that the ancient forms of adoption of the Roman Law correspond point for point with the earliest forms of true testamentary succession. Accordingly, to the Roman Law we must turn for the development of this idea.

Testamentary succession did not make a real beginning until men accepted the idea of the direct appointment of an heir, without going through the intermediate stage of sonship. The first testamentary heir is he that succeeds, not by natural succession, but by the will of his predecessor, directly to the deceased without being first his son. This stage is exemplified by the Roman Law. During the thousand years through which we trace the evolution of Roman genius in the region of law, one grand central idea dominates the whole law of wills. It is that the function of the Will is to name an heir. The conception of a legacy—of the gift by the deceased of a specific part of his property to a legatee—was originally no part of the will, and might almost be said to be alien to it. Indeed, the history of this portion of the law may be summed up in the statement that the legacy gradually encroached upon, and ended by almost superseding, the idea of universal succession, upon which was based the first introduction of wills. The Legacy came into being when first the law permitted the testator to enjoin commands upon the heir as to what he should do with this or that article of property, and when the heir was compelled to execute those commands. Finally, as will appear, if we penetrate through an outer crust of forms and a somewhat tangled story of legal learning, we shall find the Roman

Testamentary Succession.

Law reaching a point scarcely to be distinguished from the modern view, bringing the testator into direct relation with the legatee, and reducing the ancient Heir to a mere official for distributing property.

Liability of Heir.

The principle of the Roman Law until the introduction of inventories by Justinian was that the heir, as regards third parties, stood exactly in the shoes of the deceased, and was bound to pay all his debts, even if he obtained no property from him whatever. By the provisions of the XII Tables the testator, after his debts were paid, could bequeath the whole surplus of his estate to legatees. This freedom defeated itself. No inducement was left to the heir to accept the inheritance, and the heir, accordingly, by refusing to act, nullified the testament, and deprived the legatees of everything. After two ineffectual attempts to deal with this question by legislation (*Lex Furia*, B.C. 183; *Lex Voconia*, B.C. 169, if not 174), in the year B.C. 40 a statute (*Lex Falcidia*) was passed providing that in every case the heir should have one-fourth of the clear proceeds of the estate. In estimating the clear proceeds, all the debts were deducted, and the funeral expenses and the price of slaves ordered to be manumitted by the will.

Inventories.

Justinian introduced a profounder change in this than in any other branch of law. He broke up an association of ideas riveted by the practice

of more than a thousand years. The ideas of "heir" and of "unlimited liability" were indissolubly associated for ages. Justinian, at one bold stroke, converted the heir into a mere official appointed by the testator for the purpose of winding up his affairs and distributing his property. The heir now differed in nothing from a modern executor, except that he was continued in the heir's right to a fourth (*quarta Falcidia*), unless the testator expressly forbade it, and he was entitled to the property left by the testator in so far as it was not swallowed up in legacies. This result was accomplished by a process of gentle compulsion. If the heir did not make an inventory—setting forth all the property of the deceased—he not merely continued liable for the debts of the deceased, but, in addition, was compelled to pay all the legacies, even should the assets prove insufficient. On the other hand, if the heir made a full inventory in compliance with the terms of the law, he was released from all personal liability for the debts of the deceased, and was not bound to pay beyond the assets that came into his hands.

Nature of Roman Will.

The essence of a Roman will, as has been already stated, was the nomination of a universal successor to a deceased person; if a will failed in that point, it was wholly and absolutely worthless; if it accomplished that object, it could, but it need not, effect other purposes, such as the gift

of legacies or the appointment of tutors. So fastidious was the Roman Law in keeping up this relation between the heir and the legatee that, until Justinian altered the law, a legacy occurring in the will before the appointment of the heir was void. In respect of its juridical essence and validity, a will was nothing but a lawful mode of nominating an heir. Even after the profound change introduced by Justinian, the essence of the *Testamentum* continued to be the valid and successful appointment of an heir. If none of the heirs named in the will could or would accept the inheritance, the will was void, and the legacies failed of effect. The further progress of the Roman Law was not accomplished by an extension of the *testamentum*, but by practically superseding it, through a new mode of declaring a last will by *codicilli* and *fideicommissa*, which will be explained hereafter.

Essentials of Roman Will.

The making of a *testamentum*, as we might infer from its history, was an extremely complex affair. In order that it should operate effectually, it must comply with five sets of conditions. (1) Certain forms must be observed; (2) certain persons, if not made heirs, must be formally disinherited; (3) to certain persons a definite portion of the testator's property must be left; (4) an heir must be properly instituted; and (5) the testator, the witnesses, and the heir must be severally capable by law of taking the part

assigned to them. Even when a will complied with all these conditions, it might ultimately fail, owing to circumstances arising beyond the testator's control. Nay, the will might remain perfectly good, and yet, if the heir named for any reason refused to accept, the whole fell to the ground. A few words upon each of these points will suffice.

Forms of Will.

1. In the earliest times wills were made in the Comitia Calata assembled under the presidency of the Chief Pontiff. A will, being a departure from the rule of intestate succession, required the assent of the *gentes*, whose eventual interest was involved; and, since the *sacra* might be affected, it required the sanction of the College of Pontiffs. It was oral; and it was completely public. Till *the XII Tables enacted that a man's last dispositions* should be observed as law, it was probably an ordinary legislative act. This form had become practically obsolete by the time of Cicero. There was also a will made on the eve of battle (*in procinctu*), when the army was ready to fight (*Procinctus est expeditus et armatus exercitus*). Three or four comrades sufficed as witnesses. This form seems not to be mentioned in the surviving literature later than B.C. 143.

Comitiis Calatis.

In procinctu.

Per aes et libram.

The next will—the old will of Republican Rome—was originally a conveyance *inter vivos* (*per aes et libram*). The maker of the will summoned five witnesses, Roman citizens over

puberty, and a balance-holder (*libripens*). He then conveyed his whole legal status to a nominal purchaser (*familiae emptor*). At first this person was the heir, upon whom after the death of the testator devolved the duty of paying the legacies. At this stage the transaction differed in little from an ordinary conveyance. The next step was to employ a *familiae emptor* merely for form's sake, the name of the heir being contained in a written document, which was not opened till the testator's death. Up to this point, the development of the will was carried on by the jurisconsults. The next step was taken by the Praetor. He set forth in his edict that when a written will was sealed with the seals of seven witnesses (a number made up by adding the *libripens* and the *familiae emptor* to the five witnesses required for an ordinary *mancipatio*), he would give the person named as heir in the will the possession of the inheritance, even although no formal sale took place. By subsequent imperial legislation the signatures of the testator and of the witnesses were required. The written will, as it existed in the time of Justinian, had thus a threefold origin (*ius tripertitum*). The making of the will (*uno contextu*), and the presence of the witnesses all together at the ceremony, were a reminiscence of the will by *mancipatio*. The seals and the number of the witnesses came from the Practor's edict. The

Praetorian Will.

Imperial —Written Will.

signatures of the testator and of the witnesses at the foot of the will form the contribution of imperial legislation.

2. The next condition of a valid will was that if certain persons were not named heirs they should be expressly disinherited. At first this applied only to such persons as were under the *potestas* of the deceased and became independent (*sui iuris*) by his death. These heirs were called *sui heredes*. In the time of Justinian the law stood thus. On pain of invalidating his will, a testator must appoint as heirs, or else disinherit by name, not merely *sui heredes* but all his descendants through males, whether born at the testator's death or then in the womb. Inasmuch as the testator was perfectly free to disinherit all his children, it might have been assumed that, if he did not name them as heirs, he intended to exclude them from the inheritance. The true reason for this technical rule, so eminently calculated to be fatal to wills, was that the old theory of the family implied a species of co-partnership in the family estate. The children were regarded as owners even during the life of the *paterfamilias*, who was sole administrator, and, when he died, they were conceived as having obtained free administration of their estate, not as having obtained such estate by succession. The law therefore regarded them as being owners unless something had been done to turn them

Disherison.

Joint-Family.

out. The father had the power to do so, but, unless he exercised that power, there was no vacancy to which he could nominate strangers as heirs. This conception of a family copartnership must have had its roots deep in the Roman mind before it could have maintained so long an arbitrary rule that even the all-devouring zeal of Justinian did not remove.

Legitim. 3. When the testamentary power was conclusively sanctioned in the Twelve Tables, it was recognised as in its nature exceptional, and as an invasion of the rights of the family; but no hard-and-fast line was adopted to prevent the testator from leaving his children destitute. A remedy, however, was introduced on the plea that the testator's will was contrary to his duty (*testamentum inofficiosum*), and that consequently he had acted as if not of sound mind when he drew up the will. The meaning was, not that the father was really mad, but only that his will ought to be treated as if he had been mad. In considering this limitation of a testator's freedom, and the necessity of making some provision (*legitima portio*) for his nearest relatives, we must not forget that the children of the Roman *paterfamilias* had no rights of property, and that what they acquired in virtue of their own exertions or of the liberality of others was the property of their father. Thus to disable them, and at the same time to permit the father to give

what was in morals although not in law their own property to strangers, would have been to sanction a species of injustice which it is not in the power of any father in modern times to commit. After some fluctuation, the doctrine of the Roman Law came to be that the testator should leave not less than a fourth of the amount that would have fallen in case of intestacy to his children. Children were required in the same way to remember their parents in their wills, and even brothers and sisters were forbidden to exclude brothers and sisters in favour of strangers of doubtful reputation.

4. The next point requiring the attention of a testator was the formal nomination of an heir. In early times stated language was employed, as *Lucius Titius mihi heres esto*, but at length it was sufficient if the testator's intention was shown. The appointment must, however, be in express language; it could not be inferred from the testator's throwing upon a person duties appropriate to an heir. In case the person first named might die or decline to act, it was usual to add another to take in such an event. This was called Substitution, and could be carried to any extent, usually ending with the name of a slave of the testator, who obtained his freedom, but could not refuse the inheritance. This substitution (*substitutio vulgaris*) took effect only if the person instituted heir declined; if he once

Institution of Heir.

Substitution.

accepted, the substitution was at an end. In one case, however, the Roman Law permitted a substitute to come in even after a person instituted had accepted. A testator might say, "Let Titius my son be my heir. If my son shall not be my heir, or if he shall become my heir and die before he comes to puberty, then let Sempronius be heir." A son could make a will after puberty, but not before, so that in effect such a substitution (*substitutio pupillaris*) was an appointment of an heir to the son until he arrived at the age when he could name one for himself. Justinian extended this indulgence to parents of insane children, enabling them to name substitute heirs to such children, even if over the age of puberty, until their death or the recovery of their reason. This was called *substitutio exemplaris*.

Incapacity.

5. The grounds of incapacity to make a will or to be a witness or an heir are not of sufficient interest to require detailed statement. They are collected in "Roman Law," pp. 794—804.

Defects in Wills.

If a will did not comply with the proper forms, or did not name an heir, or if the testator, the heir, or any of the witnesses were incapable of acting their several parts, or if the testator did not expressly disinherit his children, the will was said to be *iniustum*, or *non iure factum*, or *nullius momenti*. If it was right in those points, but did not make provision for the legitim (*legitima portio*) of children, it was *inofficiosum*.

If the will was originally good, but no one took as heir under the will, or the testator lost his capacity before his death, it was said to be *irritum*: if no one took as heir, it was also sometimes said to be *destitutum* or *desertum*. If the testator made a new will, or his will became invalidated by the subsequent birth of a person requiring to be disinherited, but not disinherited, the original will was *ruptum*.

Non-formal Will.

From this brief sketch, it may be understood how perilous was the act of testation, even in the latest times. We may well ask why a people with the practical genius of the Romans for law continued to submit to a form of will that must constantly have frustrated the intentions of testators and the expectations of legatees. The explanation is found in the fact that in the time of Augustus a new mode of testation was introduced, which successfully enabled testators to avoid the snares and pitfalls of the *testamentum*. The mountain was too great to remove, but a way was found of simply walking round it. The device invented for this purpose was the non-formal will of the Roman Law—*Codicilli*. In their origin and essence, *codicilli* present a complete contrast to the *testamentum*. They were in the nature of requests to persons who, independently of the *codicilli*, were heirs, to give to others either some specific articles or a fraction or even the whole of the inheritance. By *codicilli*

Codicilli.

a legal heir could not be appointed. Originally they were free from all formalities; in A.D. 424, however, Theodosius required the presence of five witnesses, but Justinian enacted that, even if this testimony were wanting, a person claiming under a trust could compel the heir to tell upon oath what instructions he had received. By *codicilli* no person could be disinherited, nor did their validity depend upon providing legitim. If there was no *testamentum*, *codicilli* operated by way of trust on the heirs *ab intestato*; but if there was a *testamentum*, they were considered a charge upon the testamentary heirs, and were made to stand or fall with the will. If *codicilli* were made before a *testamentum*, the *codicilli* were presumed to be cancelled, unless the contrary was proved. It was usual, therefore, in a will to confirm *codicilli* previously made, if the testator wished them to be carried out.

Trusts. We are informed by Justinian that the Romans owed the introduction of *codicilli* to the Emperor Augustus. They became exceedingly popular on account of their convenience when the Romans were away from home, and soon a special judge was appointed to take charge of trusts (*fideicommissa*). These trusts were charges on the legal heir, whether he were appointed by will or succeeded to an intestate. From the first, great latitude was allowed in trusts. Thus aliens and Latins could take by way of trust, although

not under a will. Women could take an inheritance by trust, free from the restrictions of the *Lex Voconia*. Again, by means of trusts much greater flexibility was introduced in the settlement of property. A testator by way of trust could give his inheritance to A for life, then to B for life, and then to divide it between C, D, and E. Again, A and B might be heirs on trust that, if one died without children, his share should go to the survivor, and, if both died without children, the whole should go to C. Such limitations were impossible in a *testamentum*.

Heres and *Fideicommissarius*.

In one respect *fideicommissa* were slow in attaining maturity. When a testator—to take a simple case—charged his heir to give up one-half of the inheritance to another, it was no easy task rightly to adjust the relations of the two persons. The maxim of the Roman Law was: "Once an heir, always an heir." An heir could part with the goods he received, but he could not divest himself of his liabilities. The first plan adopted was to sell the portion of the inheritance subject to the trust to the person named for a nominal sum, and require him to guarantee the heir against a corresponding amount of the debts. In the time of Nero (probably A.D. 56), the *Senatus Consultum Trebellianum* was made, providing that, in the case of inheritances wholly or partially given up under a trust, the actions heretofore given to or against the heir should be given

to and against those to whom under the will the property was required to be surrendered. This statute was perfect, except in one point: it did not compel the legal heir to enter *pro forma* and transfer the inheritance. In a mature law of trusts it is an elementary maxim that a trust shall not fail from want of a trustee; but in this early stage of their growth the maxim was that the trust must fail unless there was a trustee.

Pegasian Fourth.

The next step was characteristic. In the reign of Vespasianus (A.D. 69—79), by the *Senatus Consultum Pegasianum*, a bribe was offered to the heir to enter; he was allowed to retain a clear fourth. This, by analogy to the Falcidian fourth, was known as the *quarta Pegasiana*. If, then, a legal heir was left by the will a fourth, or upwards, he entered, and the *Senatus Consultum Trebellianum* divided the liabilities in proportion to the shares of the inheritance. But if less than a fourth was left by will, the heir claimed the benefit of the *quarta Pegasiana*, and in this case the other statute did not apply, and at law the heir was saddled with the whole debts. Accordingly, in this case again, the old plan of a nominal sale of a portion of the inheritance was gone through, and mutual guarantees given by the heir and the beneficiary. Finally, Justinian put the law on a clear footing. He enacted that in every case the heir should enter, with the benefit of the *Senatus Consultum Trebellianum*,

but that he should, nevertheless, have the benefit of the Pegasian fourth.

Codicillary Clause.

One step alone remained to complete the development of the law of testation. It became usual to insert in wills a clause to the effect that, if for any reason the instrument failed as a will, it should be regarded as *codicilli*, and so bind the heirs *ab intestato*. This clause (*clausula codicillaris*) healed every defect in a will; for the beneficiaries, if they could not sue under the will, could compel the heirs *ab intestato* to execute the provisions of the instrument as trusts.

Sect. II.—Intestate Succession.

Three Periods.

The law of intestate succession is most conveniently considered in three periods. The first takes the law as it stood at the time of the XII Tables; the third deals with the law as finally settled by Justinian, after the publication of the Institutes: and the second covers the space intervening. The first and the third periods are characterised by logical rigour and simplicity; the middle period is one of confusing transition. At the time of the XII Tables the inheritance descended to the family as based on the *potestas*. A father and an emancipated son were in law absolute strangers for the purpose of succession. By Justinian's latest enactments, the *potestas* is disregarded, and relationship is based on the tie of blood. In the language of the jurists agnation

is superseded by cognation. In the interval between the XII Tables and the final legislation of Justinian, we trace the successive steps by which the natural came finally to supersede the artificial tie.

Succession according to the XII Tables.

Order of Succession.

The classes that took an inheritance were as follows:—(1) *sui heredes*; (2) in default of these, *adgnati*; and (3) in default of these, *gentiles*.

Sui Heredes.

Sui heredes were all such persons under the *potestas* or *manus* of the deceased as became independent on his death. Hence emancipated children, and daughters, if married and in the *manus* of their husbands, could not succeed to their father. On the other hand adopted children did succeed. *Sui heredes* took equal shares, the males not taking more than the females, nor the elder more than the younger. If some were children and others descendants of children, those descendants took only the share that their parent would have taken if he had been alive.

Adgnati.

Adgnati formed a wider group, having the same centre, but a larger circumference. Persons are *adgnati* when they are so related to a common ancestor that if they had been alive together with him they would have been under his *potestas*. The constitution of a Roman family under the *potestas* has already been considered (pp. 35, *sq.*). The agnates in the nearest degree

of kinship excluded the more remote, and those in an equal degree of propinquity took equal shares. Failing *adgnati*, the members of the *gens* to which the deceased belonged took the inheritance. Who these were, is a problem too difficult to consider here.—(*See* "Roman Law," pp. 838—840.) By the time of Gaius the succession of the *gentiles* had fallen into disuse.

Succession from the XII Tables to Justinian.

It would be wearisome and uninstructive to trace the changes from the XII Tables to Justinian in detail. But the broader features may be indicated. The Praetor introduced two great innovations. First, he allowed emancipated children to succeed along with *sui heredes*; and he allowed more distant blood relations (*cognati*) to come in after the *adgnati*. Thus according to the Praetor the order of succession was—(1) children (*unde liberi*), whether under *potestas* or not; (2) statutory heirs (*unde legitimi*), consisting principally of *adgnati*; and (3) *cognati*, or blood relations not included in the previous classes. Changes by Praetor.

Again, by the *Senatus Consultum Tertullianum* (A.D. 158), freeborn women having three children, or freedwomen having four, were enabled to succeed to their children; and by the *Senatus Consultum Orphitianum* (A.D. 178), children were permitted to succeed to their mothers. Statutory Changes.

Justinian's Final Legislation. Novels 118 and 127.

Order of Succession.

Justinian regulated succession in three classes —(1) Descendants; (2) Ascendants, along with brothers and sisters; and (3) Collaterals.

First. Descendants excluded all others. Children take equal shares; grandchildren take the share their parent would have taken if alive.

Secondly. Failing descendants, ascendants came in along with brothers and sisters of the whole blood. Children of a deceased sister or brother took that person's share.

Thirdly. Failing those, the next of kin succeed, the nearer excluding the more remote, and those in the same degree taking equal shares.

Vesting of an Inheritance.

For the purpose of vesting, heirs are divisible into three classes—(1) *Necessarii heredes*; (2) *Sui et necessarii heredes*; and (3) *Extranei heredes.*

Necessarius Heres.

A necessary (or compulsory) heir is a slave of the deceased declared free and appointed heir by his master's will. He could not refuse the inheritance. Hence, as a last resort, a slave was named heir to prevent his master's inheritance, in case he died insolvent, from being sold in his master's name, and thereby bringing upon him posthumous ignominy.

The *sui et necessarii heredes* were those under the *potestas* of deceased. At first they could not, any more than slaves, decline the inheritance; and they succeeded without the necessity of any actual acceptance (*ipso iure*). The Praetor gave them the privilege of refusal (*beneficium abstinendi*) if they did not interfere with the inheritance. *Sui Heredes.*

Extranei heredes embraced all other persons. They did not become heirs until they accepted (*aditio hereditatis*), either expressly and formally, or by acts of interference with the property of deceased. **Other Heirs.**

SECT. III.—LEGACY.

The law of bequest was founded on a single principle, namely, the intention of the testator. The rights of the legatee, and all the incidents connected with the legacy, have no other origin than the will of the testator. The law of bequest is therefore simply the interpretation of legacies But the will of a testator is limited by two circumstances, one permanent, the other local and temporary. Everywhere the will of a testator is circumscribed by the general laws of his country The State defines what property can be bequeathed, who may be legatees, and subject to what restrictions testation will be allowed. But in Rome, beyond these general limits, narrower restraints were imposed by the spirit of lega **Basis of Law of Legacy.**

Formalism that pervaded every branch of the law. It was the universal tendency of the old Roman Law to prefer the form to the spirit; and thus, in the law of legacy, the intention of the testator was not respected unless it was expressed in one or other of certain precise forms.

Old Forms of Bequest.

During the Republic a legacy must be made in one of four forms. The first was said to *per uindicationem*, because it transferred the ownership of the thing bequeathed to the legatee immediately when the heir entered. The object of bequest accordingly must be in the ownership (*ex iure Quiritium*) of the testator. The form was this:—"To Lucius Titius I give and bequeath (*do lego*) the slave Stichus." The second was *per damnationem*. It imposed a duty on the heir: "Let my heir be condemned (*damnas esto*) to give the slave Stichus to Lucius Titius." Here the slave Stichus may or may not belong to the testator: if he does not, the heir must buy him from his owner and deliver him to the legatee, or, failing which, he must pay the value of Stichus. These were the chief forms; the others were mere variations. The third, called *sinendi modo*, ran thus: "Let my heir be condemned to allow (*sinere*) Lucius Titius to take and have for himself the slave Stichus." The fourth, *per praeceptionem*, was to this effect:—"Let Lucius Titius pick out first (*praecipito*) the slave Stichus," that is, before the division of the

inheritance, Titius being here taken to be a co-heir.

Trusts and Legacies.

The introduction of trusts (*fideicommissa*) in the time of Augustus afforded a means of escape from the narrow pedantry of the old forms of legacy. During the Empire, the two systems continued side by side. A testator might rely upon the old rules, or, if they did not suit his purpose, he could take advantage of trusts. The inconvenience arising from bequests made in a wrong form—as a bequest of a thing not belonging to the testator *per uindicationem* — was remedied by the *Senatus Consultum Neronianum*, passed at the instance of Nero (A.D. 64), which enacted that a legacy left in an unsuitable form should take effect just as if it had been left in the form most favourable to the legatee (*optimum iure legati*): this is, *per damnationem*. Justinian fused the old law with the newer equity, and enacted that legacies should be construed with all the liberality of trusts, and that trusts should be enforced by all the remedies applicable to legacies. The law was thus placed on a simple and right foundation. It rested upon the intention of the testator, and it was carried out by direct and appropriate actions.

Fusion of Law and Equity.

Donatio Mortis Causa.

A gift in anticipation of death (*donatio mortis causa*) was made subject to nearly all the rules of legacies. Such a gift was made to the donee, or to any one on his behalf, on condition that it

should be his property if the donor died, but that, if the donor should survive the anticipated peril, he should have his property back. Justinian required such a gift to be attested by five witnesses.

Legacy of Mortgaged Property.

The law of legacy is a law of detail, and cannot well be summarised. It will be sufficient in this place to advert to a few points. When the property bequeathed was mortgaged, the heir was bound to pay off the mortgage, unless he could prove either that the testator was not aware of the mortgage, or that the testator expressly charged the legatee to pay it off. Again, money due to a testator might be the object of a legacy, and if it were not paid in the testator's lifetime (in which case the legacy was extinguished), the heir was bound to permit the legatee to sue the debtor in his name. If the testator bequeathed to a debtor the amount due to him, the debtor could demand a formal release from the heir. A legacy of a sum due by the testator to his creditor was inept, unless it differed in some respect from the debt.

Legacy of Debts.

Specific Legacies.

The chief distinction in legacies was between specific and general legacies. When a testator bequeathed a determinate, specific thing, then upon the entry of the heir the legatee became owner. If a quantity of anything was bequeathed, the legatee was simply a creditor of the heir for the amount. By a legacy of 20 *aurei*, the relation

merely of debtor and creditor was established; but a legacy of all the *aurei* in a chest made the legatee owner of the particular coins.

Error in names was harmless. So a false description did not annul a legacy (*falsa demonstratio non nocet*). When a part of the description is sufficient to identify the object or person, and the remainder of the description is unnecessary for that purpose, the falsehood of this superfluous addition is immaterial. But if the whole of the description is necessary and part of it is erroneous, the legacy fails. A testator had two slaves, Philonicus, a baker, and Flaccus, a fuller. He bequeathed to his wife Flaccus the baker. If the testator knew the names of the slaves, Flaccus will be the legacy; if he knew them by their occupations and not by their names, Philonicus will be given. On the contrary, if A bequeaths to B the sum Titius owes to A, and Titius owes nothing, the legacy must fail, as there is nothing to determine the legacy except the amount due by Titius.

Mistake.

Falsa Demonstratio.

Akin to this is the rule that a mistaken inducement (*falsa causa*) does not vitiate a legacy; as when one says "To Titius, because in my absence he looked after my business, I give and leave Stichus," or "To Titius, because by his advocacy I was cleared of a capital charge, I give and leave Stichus." For, although Titius never managed any business for the testator, and

Falsa Causa.

although his advocacy never cleared him, yet the legacy takes effect. But if the heir could prove that the testator would not have left the legacy but for his erroneous belief, he could defeat the legatee on the ground that his claim was against good conscience (*exceptio doli mali*).

Restraints on Alienation.

Among the restraints on testation only two call here for special notice. A testator could not bequeath property and forbid the legatee to alienate it; but according to a rescript of Severus and Antoninus, although a general prohibition to alienate was void, yet, if the restriction was made in the interest of a limited class (as children, freedmen, heirs, or any specified person), it was upheld, of course without prejudice to the creditors of the testator. In this way a very strict entail might be established. A similar rule applied to conditions in restraint of marriage. If the legatee or heir were forbidden to marry anybody at all, the legacy or will was perfectly good, and the restriction was null and void. But a condition that the heir or legatee should not marry a particular person or persons was good.

Restraints on Marriage.

Revocation of Legacies.

A legacy might be revoked by express language, or if the thing bequeathed perished. A revocation was implied from a serious quarrel arising between the testator and the legatee after the making of the legacy. A testator gave his freedman a legacy, and in a subsequent will described him as ungrateful: this was held to be

an implied revocation. A subsequent mortgage of the thing bequeathed did not revoke the legacy; on the contrary, the presumption was that the testator intended the heir to pay off the mortgage. If the testator alienated the property, the presumption was that he meant to revoke the legacy, and it was for the legatee, if he could, to prove the contrary. If, however, the alienation was prompted by necessity, the burden of proving an intention to revoke lay on the heir.

CHAPTER VI.

THE LAW OF PROCEDURE.

Historical Interest of Roman Procedure.

THE interest attaching to the Roman Law of Procedure is mainly historical. From the pages of Gaius we can trace, in outline at least, the steps by which civil procedure was brought to a satisfactory condition. The history of Procedure is, in one word, the history of the efforts of the State to control the transactions of men. It is the history of the growth of jurisdiction. At first the right of the State to interfere in private quarrels is not recognised; but later on, the Roman magistrate appears in the guise of a voluntary arbitrator, a character that insensibly changed into a compulsory arbitrator. For the sake of clearness, it will be convenient to illustrate this proposition by examining the history of procedure under four heads. These shall be, in order, the successive steps in a lawsuit:—(1) the summons to court; (2) proceedings from the appearance of the parties in court till judgment; (3) execution of judgments; and (4) appeals.

Jurisdiction springs from Arbitration.

Summons.

THE SUMMONS.—The process of summoning a defendant to court exhibits, in a marked manner, the early characteristics of civil jurisdiction. By

the law of the XII Tables a complainant personally summoned a defendant. If the defendant refused, he could call witnesses to his refusal, and thereupon drag him before the court. The law did not impose a legal duty upon the defendant to obey, and, if he did not go, no further proceedings could be taken; all that the XII Tables authorised was that, on proof of a refusal, the complainant might use force without incurring any liability. The Practor, however, carried the law a step further. He made it an offence to refuse obedience to a summons, or to rescue a person summoned, or in any way to aid his escape. Thus by the action of the Praetor, the Roman magistrate assumed a right to hear all disputes, and the first step in civil jurisdiction was established. Later on, under the Empire, the summons was served by a public officer, and it was made in writing (*libellus conuentionis*), containing a precise statement of the demands of the complainant.

Reference to Arbitration.

FROM APPEARANCE TILL JUDGMENT.—Until the reign of Diocletianus (with a few exceptions not requiring notice in this place) a true civil court did not exist in Rome. To those who read warm eulogies on the civil procedure of Republican Rome, this statement may appear a strange paradox. It admits, however, of a simple demonstration. Before the time of Diocletianus, the

ordinary civil trial in Rome consisted in a reference to arbitration. What happened was exactly the same as if in an English suit, at the close of the pleadings, a case, instead of being tried by a judge and jury, or by a judge alone, was immediately referred to one or more arbitrators selected by the parties themselves, these arbitrators being laymen, and not lawyers.

Iudex. Arbiter. The arbitrator, if only one was chosen, was called *iudex* or *arbiter*, the distinction between which is as old as the XII Tables. Originally, it would seem, the *iudex* dealt with regular hostile suits (*lites*), the *arbiter* with amicable arrangements of disputes (*iurgia*); but, when the Praetor introduced new "arbitria" without reference to this distinction, the terms naturally became confused (by about the time of Cicero), *arbiter*, however, always suggesting wider equitable considerations. ("Arbiter dicitur iudex," says Festus, "quod totius rei habeat arbitrium et facultatem"). The *iudex* or *arbiter* was not a lawyer; he was not paid; he was compelled to act, if duly selected; and he was called in for a single case only. The parties might agree in their choice; if not, they must choose from a panel, consisting at first of senators, but varying in later times with political changes. The patrician institution of the *iudices* was balanced by the *Centumviri*, who might be plebeians. These were most probably elected five

Centumviri.

from each of the thirty-five tribes, making in all 105. If so, the institution would date, in that form at least, not earlier than B.C. 241; but some scholars carry it back to the early Republic, if not to the foundation of the City. At any rate, it was closely identified with the old institutions of Rome, and asserted a special care of the *ius Quiritium*, notably in the cases for inheritance. Both *iudices* and *centumuiri* were for Roman citizens. When aliens were admitted to the protection of the civil law, the *iudex* or *centumuiri* could not be compelled to act; but the spirit of the Roman institution was observed, and the cause was referred to three or five persons (*recuperatores*) selected by the parties, either one or two by each party, with an umpire, from a panel drawn by lot by the magistrate.

Recuperatores.

When an action is referred to arbitration, two stages are to be noticed. There is first the reference or selection of the arbitrator, and the determination of the question to be referred to him; and secondly, the arbitration itself or the hearing. These two stages are distinguished in Roman Law by terms that have become classical in legal literature, *ius* and *iudicium*. The selection of the arbitrator and the settlement of the question to be decided took place under the authority of the Praetor (*in iure*); the hearing (*in iudicio*) was before the *iudex*, *arbiter*, *centumuiri*, or *recuperatores*. The procedure *in*

Ius. Iudicium.

iudicio does not call for any remark in this connection; but the procedure *in iure* will repay some consideration.

Oral Reference.

The mode of reference was at first ORAL, afterwards *in writing*. The written reference was called a *formula;* the oral reference had no distinctive name, but it followed the form of one or other of the so-called *Legis Actiones*—forms of procedure, if not prescribed by, at all events strictly based upon, the LEX (the XII Tables). The *legis actiones* could not be used by aliens (hence the introduction of *formulae* may possibly mark the admission of aliens to civil rights); and, like all the ancient formal proceedings of the Roman Law, they could not be employed by an agent or representative of the parties. Every step in the *legis actio* must be taken by the parties themselves.

Legis Actiones.

Sacramentum.

The oldest of these forms of process (*sacramentum*) alone calls for notice. It was based on a mock combat, with a pretended voluntary reference to arbitration, and the wager of a sum that was to go to the arbitrator for his trouble. The moveable in dispute, say a slave, was brought before the Praetor. The claimant held a rod (representing a spear, the symbol of Quiritarian ownership), and, grasping the slave, said: "This slave I say is mine *ex iure Quiritium*, in accordance with the fitting ground therefor, as I have stated; and so upon thee I have laid this

wand," and at the same time laid the rod on the slave. The opposing party repeated the same words and the same acts. Then the Praetor said: "Both let go the slave"; they let him go. The first claimant then said: "I demand that you tell me on what ground you have claimed him"; and he answered: "I fully told my right as I laid on the wand." The first claimant retorted: "Since you have claimed him wrongfully, I challenge you to wager 500 *asses*" (the *as* was a small piece of copper, later a coin); and the opposing party: "In like manner I challenge thee." After this ceremony the Praetor inquired into the merits of the case, and adjudicated the *interim* possession to one of the parties; the other party then appeared as plaintiff before the *iudex*, to whom the question was referred in this singular form—not which of the parties was the owner, but which of them was right in his wager. In this short drama, which formed the prelude for many years to every Roman action, we cannot fail to perceive the true origin of civil jurisdiction—the submission of disputants to the award of an arbitrator to prevent the effusion of blood.

Formulae.

The system of *legis actiones* was superseded by the use of *formulae*. When the Praetors first determined to administer justice in cases where one of the parties was an alien, they dispensed with the ceremonies exclusively appertaining to

the old customs of Rome, proceeded at once to inquire into the nature of the dispute, and put in writing the questions to be decided by the arbitrator. The great superiority of this method recommended it in disputes between citizens, to whom the rigorous and narrow pedantry of the *legis actio* became odious. By the *lex Aebutia* (B.C. 149—126, if not earlier), and the *leges Juliae* (? B.C. 17), the *legis actio* was almost wholly superseded by the *formula*.

Formula in Factum Concepta.

The earliest *formulae* were so framed as to avoid the allegation of an *obligatio*. There would have been a difficulty in saying that an alien had a strict right. Accordingly, the *formula* contained merely allegations of fact, stated hypothetically, followed by an authority to the arbitrator to award damages if the facts were proved. Thus, in the case of deposit, the *formula in factum* ran:—"*Let Lucius Titius be* iudex. *If it appears that A. A. deposited with N. N. a silver table, and that, by the fraud of N. N., it has not been given back to A. A., whatever turns out to be the value of the article, that sum of money,* index, *condemn N. N. to pay A. A. If it does not so appear, acquit him.*" In the case of citizens, there was no reason to shrink from alleging a duty. Accordingly, the *formula in ius* was framed upon a positive allegation of fact, followed by an allegation of legal duty. The allegation of fact was called *demonstratio;* the

Demonstratio.

allegation of legal duty was called *intentio;* and the power to award damages *condemnatio.* When, as in actions for division of property, an authority was given to assign different parts to the various claimants, the place of the *condemnatio* was taken by the *adiudicatio.* The *formula in ius* ran thus:—"*Let Lucius Titius be* index. *Whereas A. A. sold a slave to N. N., if it appears that N. N. ought to give A. A.* 10,000 sestertii, *then,* index, *condemn N. N. to pay* 10,000 sestertii *to A. A. If it does not so appear, acquit him.*" Sometimes another part, called the *exceptio,* was introduced. In formal contracts or formal transactions generally, the Roman Law did not originally allow the defence of fraud; and although the plaintiff had induced *the defendant to bind himself by the grossest* fraud, that was not a question into which the *index* could enter. But at length *Aquilius Gallus* introduced such a defence, and, accordingly, after his time, the *formula* might embrace a proviso, "If in that matter nothing has been done, or is being done, by fraud on the part of the plaintiff." Many similar provisions were allowed; as, in cases of violence, intimidation, &c. As the *exceptio* was based on equity, any countervailing facts could be brought forward in reply by the plaintiff. This answer to the *exceptio* was called *replicatio.*

Intentio.

Condemnatio.

Adiudicatio.

Formula in ius concepta.

Exceptio.

Replicatio

Defects of *Formulae.*

It thus appears that, viewed as a system of pleading, the formulary system was rude and imperfect. It conveyed the slightest possible information to the defendant, and scarcely took more than the first step in eliminating the real issues between the parties. This—the true end of all pleading—was thus most inadequately accomplished during the golden era of Roman Jurisprudence.

Interdicts.

In the larger work on Roman Law (p. 997 *sq.*) the nature of interdicts as distinguished from actions is discussed at length; here it must suffice to say that the interdict was a form of process created by the Praetor, and resting upon his authority as a magistrate; that it was employed mainly to protect rights in the nature of property introduced in his edict; and that the proceedings were modelled on the ordinary forms of *actio*. In the time of Justinian no formal interdict was granted, and there was nothing to distinguish *interdictum* from *actio* as forms of civil process.

Changes under Diocletianus.

The distinction so prominent in Roman Law between *ius* and *iudicium* continued until A.D. 294, when Diocletianus enacted that all causes should be heard from beginning to end by one and the same judicial officer. The *formula* was no longer used, and its place was occupied by a preliminary discussion to elicit the points in dispute. Hence came the characteristic of the later Roman procedure, that the process which

we may not inaptly call pleading took place before the court itself. Causes were now heard by trained lawyers, instead of private arbitrators, and at last, it may be said, the Romans obtained a true civil court.

Execution against the Person.

EXECUTION OF JUDGMENTS.—The natural way of compelling payment of a judgment debt, as it would seem to us, is to take a portion of the debtor's property, if he has any, and sell it to satisfy the judgment creditor. If the debtor has no goods, then we may think of his person and imprison him. This mode of thought shows how far we have advanced from the ideas of the men who built up the fabric of civil jurisdiction. That which we think of as first was last, and what we regard as last was first. Execution directly against the property of a judgment debtor was not introduced in Rome until the time of the Empire. The ancient mode of compelling the payment of debts is described to us by Aulus Gellius. The XII Tables provided that a debtor was to have thirty days after the judgment debt was proved in order to pay. After that the creditor might arrest him and take him before the Praetor; if the debtor did not find a substitute (*uindex*) to answer for the debt, he was removed by the creditor and put in chains. On three successive market days the creditor was required to bring the debtor before the Praetor

Law of XII Tables.

and proclaim the amount of his debt. If at the end of sixty days the debt was not paid, the debtor was reduced to slavery. In these proceedings, it is worthy of remark, the initiative is taken, not by the State, but by the creditor. The law interfered only to take precautions in the interest of the debtor, so that no man might unlawfully seize another on the pretext of a debt. These proceedings were essentially a private act of force legalised and subjected to legal restraints. Just as the summons, in its first shape, was purely a private act, in which the law simply made the exercise of force lawful, so in the execution of judgments, the law went no further than a refusal to shield a debtor from his creditor.

Appeals during Republic.

APPEALS.—During the Republic, no appeal, properly so called, in a civil cause, existed. But a partial substitute for appeals was found in the right enjoyed by each of the higher magistrates of putting a veto on the acts of any other magistrate. Such a veto was called *intercessio*. The effect of the veto was purely negative; it stopped for the time the act forbidden, but it could substitute nothing in its place. The concentration of all magisterial power in the hands of the Emperor soon led to the subordination of the tribunals, and the establishment of a final court of appeal. The Emperor was the highest judge,

Appeals under Empire.

and sometimes heard causes himself; but the *consistorium* or *auditorium*, consisting of the higher officials attached to the Emperor, formed the usual tribunal of ultimate appeal.

APPENDIX.

APPENDIX.

QUESTIONS.

CHAPTER I.

1. What place does Roman Law occupy in General Jurisprudence?

2. Distinguish *ius ciuile* from *ius gentium*, and explain how the latter came to be identified with the Law of Nature.

3. Explain *leges regiae, ius Papirianum, ius Flauianum*, and *ius Aelianum*.

4. By what agencies is the adaptation of law to the wants of a progressive community accomplished? Compare on this point the history of Roman and English Law.

5. Give an account of the *Iurisprudentes*. In what manner did their labours contribute to the growth of Roman Law? Explain what is meant by the "Law of Citations."

6. Give a brief history of the *Edictum perpetuum*.

7. Upon what principles, and with what leading results, did the Praetor modify and enlarge the *ius ciuile*?

8. Explain *lex, plebiscitum, populiscitum, senatus consultum, constitutio, decretum, epistola, rescriptum*.

9. Give a brief statement of the modes of legislation under the Republic.

10. What attempts at codification were made prior to the time of Justinian?

11. Give an account of the legal achievements in the reign of Justinian. What is Bluhme's discovery?

12. What is the relation of the Institutes of Justinian to the Institutes of Gaius?

CHAPTER II.

SECTION I.

13. What place does slavery occupy among the institutions of ancient society?

14. What powers could a master legally exercise over his slave? Is the answer the same for the Republic and the age of the Antonines?

15. In what sense, and to what extent, could a slave enjoy rights of property?

16. In what ways did a person become a slave?

17. Explain *postliminium* and *capitis deminutio.*

18. In what ways could formal manumission be made? Distinguish between the effects of formal and non-formal manumission.

19. Give an account of *Latini Iuniani* and *Dediticii.*

20. What restraints on manumission existed in the time of Justinian?

21. What rights had a patron over his manumitted slave?

SECTION II.

22. What legal powers could a father exercise over his legitimate children?

23. To what extent could a son or daughter under *potestas* enjoy rights of property?

24. Explain the constitution of the Roman family as based on the *patria potestas.*

25. What was *legitimatio per subsequens matrimonium?* In what cases did it apply?

26. What is the true place of Adoption in the history of law? What change did Justinian introduce?

27. What was the legal relation of a father to an emancipated son, and to a son that had never been in his *potestas?*

28. Explain the phrases *alieni iuris* and *sui iuris.*

SECTION III.

29. Compare the legal position of a slave, a child under *potestas,* and a wife *in manu.*

30. In what way did *manus* become obsolete?

31. What legal relation existed between a husband and a wife not *in manu*?

32. In what way, and under what restrictions, was Divorce sanctioned in the Roman Law? What provisions were made for the custody of children of divorced parents?

33. Give an account of the *dos* and of the *donatio propter nuptias*. Compare the Roman rules with the ordinary provisions of an English marriage settlement.

Section IV.

34. Compare the office of *tutor* with the functions of an English trustee or guardian.

35. Explain the phrase *interponere auctoritatem*.

36. Explain the rule of the civil law—*in rem suam auctorem tutorem fieri non posse*.

37. To what extent could a person under puberty acquire legal rights or subject himself to legal duties?

38. By what modes could a tutor be appointed?

39. In what cases was security required from *tutores*?

40. Could a person above the age of puberty obtain relief from an improvident bargain? What was the advantage of giving a curator to a person above the age of puberty?

41. To what other persons could curators be appointed?

CHAPTER III.

Section I.

42. Is individual ownership the earliest historical form of property?

43. Specify the two leading defects of the ancient Roman law of property.

44. What were *res mancipi*? Describe *mancipatio*.

45. Explain the origin and fate of the distinction between Quiritarian and Bonitarian ownership.

46. By whom, and in what way, was the enjoyment of property in Rome secured to aliens?

47. *Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur*. Explain this rule. To what

causes do you attribute its appearance in Roman Law? Illustrate your answer by reference to the rule of English Law.

48. In what various ways could *traditio* be effected?

49. What conditions were necessary to acquire the ownership of a thing by prescription?

50. Distinguish between Positive and Negative Prescription? What was the practical importance of the distinction?

51. What things were *res nullius*, and how could the ownership of them be acquired?

52. Compare and criticise the distinction made between corporeal and incorporeal things in the English and in the Roman Law respectively.

53. What were the several kinds of Accession? What is the logical basis of accession, and by what equitable principles was its application accompanied?

54. Upon what principle was the ownership settled of an island formed in a river (1) by accretion in midstream, and (2) by a change in the course of the river?

55. Did the Roman Law recognise the right of a tenant farmer to compensation for unexhausted improvements?

56. What was the Roman rule in regard to tenants' fixtures?

57. Did the doctrine of principal and accessory apply in the case of books and pictures?

58. Give an account of *specificatio*, and distinguish it from *commixtio* and *confusio*.

59. Explain *res extra nostrum patrimonium* and *res diuini iuris*.

60. Distinguish and compare *res communes*, *res publicae*, and *res universitatis*.

61. What rights did the public enjoy under the Roman Law in (1) the sea; (2) the sea-shore; (3) rivers; and (4) the banks of rivers?

Section II.

62. Is an estate for life properly described as limited ownership or as a personal servitude?

63. State and criticise the distinction made by the Roman jurists between personal and praedial servitudes.

64. Distinguish Usufruct from Quasi-Usufruct.

65. Compare the rights of a usufructuary of land with the powers of an English tenant for life.
66. What restrictions were imposed on the usufructuary of a house?
67. How was usufruct created and extinguished?
68. Explain *usus*, *habitatio*, and *operae seruorum*.

SECTION III.

69. Define "praedial servitude," and explain *praedium dominans* and *praedium seruiens*.
70. Explain the maxim—*Nulli res sua seruit*.
71. Distinguish between negative and affirmative servitudes.
72. What is meant by saying that servitudes must be "perpetual," that they are "indivisible," and that there cannot be a servitude of a servitude?
73. Distinguish urban and rural servitudes. Give the principal examples of each.
74. How were servitudes created and extinguished?

SECTION IV.

75. What is *Emphyteusis*? What controversy as to its juridical place existed, and how was it removed?
76. Give an account of the rights of an *emphyteuta*, and of his superior landlord.

SECTION V.

77. What was the earliest form of Mortgage in the Roman Law, and what were its defects?
78. Distinguish between *pignus* and *hypotheca*. How were they introduced, and in what way did they improve the Roman law of mortgage?
79. How was the "power of sale" exercised by the mortgagee?
80. Did the Roman Law recognise "foreclosure"?
81. By what rules was the right of priority determined when the same thing was mortgaged to more than one person?
82. In what cases was a mortgage implied without special agreement?

CHAPTER IV.

SECTION I.

83. Explain the distinction between rights *in rem* and rights *in personam*.

84. To which class of rights does "contract" belong?

85. What causes led the Roman jurists to take the standpoint of "*obligatio*" instead of its equivalent, "right *in personam*"?

86. Distinguish express contract, implied contract, and quasi-contract.

87. Is it correct to class delicts with contracts as the two leading groups of *obligationes*?

88. Analyse an "agreement."

89. Explain *obligatio, conuentio, contractus, pactum, pollicitatio, ciuilis obligatio, honoraria obligatio, naturalis obligatio.*

90. What is meant by "essential" error, and what are its kinds?

91. What is error *in materia* or *substantia*? State in what cases, according to Savigny, such error vitiated contracts?

92. When can an action be brought for breach of contract, (1) when no time, and (2) when a time, has been agreed upon for performance?

93. Could a debtor be sued for breach of contract in a place different from that where he had agreed to perform his promise?

94. If no place were designated in the contract for performance, where ought an action for breach of contract to be brought?

95. "Define 'condition.'" Could the condition relate to a past or present event?

96. Distinguish between *dies cedit* and *dies uenit*. Apply the distinction to (1) a conditional contract; (2) an unconditional contract to be performed at a future day; and (3) an unconditional contract to be performed at once.

97. What different rules as to conditions were applied in the law of contract and in the law of wills?

98. Define *uis*, *metus*, and *dolus*. In what cases was a contract invalidated if it was made by one of the parties through *uis*, *metus*, or *dolus*?

99. Give illustrations from the Roman Law of sale of the effects of *suppressio ueri* and *suggestio falsi*.

100. If a written security is given against an intended loan, but the money is never lent, can an action be maintained on the security?

101. Explain the maxim—*Impossibilium nulla obligatio est.*

102. What was the *pactum de quota litis*?

103. Show to what extent slaves and *filiifamilias* could bind themselves or their *peculium* by contract.

104. Explain the tardy recognition of Agency in the Roman Law.

105. What is necessary to constitute true agency?

106. How far under the later law could slaves and *filiifamilias* act as agents?

107. To what extent was a ship captain an agent for the owner?

108. To what extent was a shopkeeper (*institor*) an agent for his employer?

109. To what extent, according to Savigny, could one free person be agent for another in the later law?

Section II.

110. Arrange the contracts of the Roman Law as set forth in the Institutes of Justinian.

111. What are the principles upon which the Roman contracts may be rearranged? Compare with the English law.

112. Explain and exemplify *pacta praetoria* and *pacta legitima*.

113. Explain the maxim—*Nuda pactio obligationem non parit, sed parit exceptionem.*

114. Enumerate the characteristics of *naturalis obligatio*.

Section III.

115. What is *nexum*?

116. What constituted a *stipulatio*, and what were the advantages of recording a stipulation in writing?

117. Explain *cautio*, *expensilatio*, *nomen transscripticium*, *chirographum*, *syngrapha*.

Section IV.

118. What is *mutuum?* To what things did it apply?
119. Explain *pecunia traiectitia.*
120. State the purport of the *Senatusconsultum Macedonianum.*
121. Define *commodatum.* Under what circumstances was the borrower bound to make good the loss of the thing borrowed?
122. What were the rights of a *commodatarius?*
123. What is *depositum?* When was a deposit said to be *miserabile?* What was the liability of the depositee for misconduct or negligence?
124. Define mandate. Could there be a mandate for the benefit of the *mandatarius* solely? Discuss the question.
125. Enumerate and exemplify the principal cases of mandate.
126. When can a *mandatarius* renounce?
127. Illustrate the proposition that a *mandatarius* must conform to his instructions.
128. What degree of care was incumbent on the *mandatarius?* Is the mandate an exception to any general rule?
129. What was the relation between a *mandator* and the third parties with whom the *mandatarius* made contracts on his behalf?
130. What rights had a *mandatarius* against a *mandator?*
131. If a *mandatarius* executed a mandate after the death of the *mandator,* but in ignorance of the fact, was he entitled to the usual rights of a *mandatarius?*

Section V.

132. Define Sale. How was a verbal contract of sale affected (1) by an understanding that it should be committed to writing, and (2) by giving earnest?
133. Could a contract of sale be set aside on the ground of inadequacy or excess in the price?
134. At what moment was there a contract of sale when the determination of the price was left to a third party?

135. Explain *uacua possessio.* Why did not the Roman Law require vendors to give the *ownership* of the thing sold?

136. State in the language of jurisprudence the nature of the right acquired by a buyer in the thing sold in virtue of the contract of sale.

137. At what moment did the interest of a buyer in the thing sold commence?

138. In what cases did goods sold remain at the risk of the vendor?

139. State the effect, if buyer or seller were *in mora.*

140. Enumerate the duties of vendor and buyer respectively.

141. Explain the maxim "*caueat emptor,*" and account for the difference between the Roman and the English Law.

Section VI.

142. Define *Locatio-conductio.* Distinguish it from *commodatum*, mandate, sale, and the similar innominate contract. Give examples.

143. What was the nature of the right that a tenant of land or houses had?

144. What were the duties of a landlord?

145. Specify the duties of a tenant.

146. Explain the confusion between *locatio operarum* and *locatio operis faciendi.*

147. What were the duties of a workman?

148. State the provisions of the *Lex Rhodia de iactu.*

Section VII.

149. Define partnership. What is *leonina societas?*

150. State the broad distinction between the Roman law of partnership and modern law.

151. By what rules were the shares of partners determined?

152. In what way was partnership ended?

153. Enumerate and distinguish the several kinds of partnership.

154. What were the rights and duties of partners?

Section VIII.

155. Enumerate the ways whereby an obligation could be extinguished.

156. In what cases was impossibility an excuse for non-performance of an obligation?

157. Explain and illustrate the statement—*Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est.*

158. What was the Aquilian Stipulation?

159. Distinguish between the effects of a formal release and of a *pactum de non petendo.*

160. When were actions extinguished by lapse of time?

161. Specify and distinguish the three cases to which the name of *novatio* was applied.

162. Was a right *in personam* transferable, and, if so, subject to what conditions?

163. What is *delegatio?* How was it effected? What was the legal presumption established by Justinian in regard to novation?

Section IX.

164. In what different ways could Suretyship be created? Distinguish them, and arrange them according to their relative antiquity.

165. State the effect of the *Senatusconsultum Velleianum.*

166. Could the surety be sued before the principal debtor?

167. In what cases did the discharge of the principal debtor release the surety, and in what cases did the discharge of the surety release the principal debtor?

168. Had a surety that paid the debt any right of contribution against his co-sureties? State the provisions of the Roman Law on the subject.

Section X.

169. In what cases could money paid by mistake be recovered?

170. Examine the maxim, that ignorance of fact is an excuse, but not ignorance of law.

171. Compare *negotiorum gestio* with mandate.

Section XI.

172. Distinguish *iniuria* from *damnum iniuria*. Apply your distinction to the case of a slave.

173. Give instances of *iniuria*.

174. To what extent was the plea of self-defence available?

175. When was an *iniuria* said to be *atrox?*

176. Who had the right of action for an *iniuria* done to a person under *potestas*, or to a wife?

177. Classify wrongs to property.

178. Define theft. What is meant by stealing the use or the possession of a thing?

179. By what principle was it settled when a non-owner could bring an action for theft? Apply the principle to *locatio conductio, commodatum*, and deposit.

180. What penalties (civil or criminal) were provided by the Roman Law for theft?

181. What was the penalty for robbery?

182. What was the penalty imposed when a person forcibly seized a thing under a *bona fide* claim of right?

183. What were the provisions of the *Lex Aquilia?*

184. In what cases was a *directa actio* available under the *Lex Aquilia*, and in what cases an *utilis actio*, and an *actio in factum?*

185. Mention the illustrations of negligence given in the Institutes. What is meant by saying that want of skill is equivalent to negligence?

186. Did the Roman Law take account of consequential damages?

187. What remedies were provided for trespass and ejectment?

188. What is meant by quasi-delict?

189. What liability was incurred by a *iudex* when he gave a wrong decision?

190. What was the penalty for placing or hanging things so as to be a danger in thoroughfares?

191. State the liability of the occupier of a house for damage done by throwing things out into thoroughfares.

192. What vicarious responsibility was incurred by shipmasters, innkeepers, and livery-stable keepers?

CHAPTER V.

SECTION I.

193. What contrast does Sir H. S. Maine draw between the Roman and the modern will?

194. How is heirship determined in Hindoo law?

195. Explain "universal succession," and "*damnosa hereditas*"?

196. What was the ancient character of intestate succession?

197. Explain the position of adoption as a link between intestate succession and wills.

198. What relation existed between the heir and the legatee?

199. State the object and provisions of the *Lex Falcidia*.

200. In what way did Justinian enable heirs to escape unlimited liability?

201. What constituted the essence of a Roman will?

202. Enumerate the conditions necessary to a valid *testamentum*.

203. Describe the form of will in the time of Justinian, and explain the origin of its characteristic features.

204. What was disherison? How did the rules on the subject originate?

205. Explain *legitima portio*. Who were entitled to it?

206. Explain *institutio heredis*, *substitutio vulgaris*, *substitutio pupillaris*, and *substitutio exemplaris*.

207. When was a *testamentum* said to be *iniustum*, *nullius momenti*, *inofficiosum*, *inritum*, *ruptum*, or *destitutum*?

208. Explain how the drawbacks of the testament were got rid of by the use of *codicilli*.

209. How did *codicilli* take effect (1) if there was, and (2) if there was not, a testament?

210. Show how the power of testators was enlarged by trusts (*fideicommissa*).

211. Explain the necessity for, and the provisions of, the *Senatusconsulta Trebellianum* and *Pegasianum*.

212. What was the nature, and what was the use of the *clausula codicillaris*?

SECTION II.

213. Into what periods may the history of intestate succession in Rome be divided?

214. Give the rules of succession as fixed by the XII Tables.

215. What were the principal changes introduced by the Praetor in intestate succession?

216. State the effects of the *Senatusconsulta Tertullianum* and *Orphitianum*.

217. Describe the order of succession as fixed in Justinian's novels.

218. Distinguish *heredes necessarii, heredes sui et necessarii, heredes extranei;* and explain *beneficium abstinendi, aditio hereditatis.*

SECTION III.

219. What is the basis of the law of legacy?

220. Explain the forms of bequest *per vindicationem, per damnationem, sinendi modo,* and *per praeceptionem.*

221. Give an account of Justinian's fusion of legacies and trusts.

222. What is a *donatio mortis causa*?

223. When property bequeathed was subject to a mortgage, was the heir bound to pay off the mortgage?

224. Could a debt be the object of a legacy?

225. What was the nature of the legatee's right when the legacy was (1) specific, (2) general?

226. Explain and illustrate the maxims *falsa demonstratio non nocet* and *falsa causa non nocet.*

227. Could a legacy be left with a restraint on alienation?

228. What restraints on marriage were illegal?

229. If a testator, after making his will, sold or mortgaged a thing left to a legatee, was the legacy thereby revoked?

CHAPTER VI.

230. Discuss the proposition that jurisdiction springs from arbitration.

231. Give a brief sketch of the history of the Roman Summons.

232. Explain the functions of the *iudex*, *arbiter*, *centumviri*, and *recuperatores*.

233. Explain the distinction between *ius* and *iudicium*.

234. What were the *Legis actiones*? What were their advantages?

235. Give an account of the *sacramentum*.

236. How was the Formulary system introduced?

237. Distinguish *formula in factum concepta* and *formula in ius concepta*, and give an example of each.

238. Explain *demonstratio*, *intentio*, *condemnatio*, *adiudicatio*, *exceptio*, *replicatio*.

239. What defects characterised the formulary system?

240. What were *Interdicta*?

241. Explain the nature of the change introduced by Diocletianus.

242. Give an historical sketch of the law of execution of judgments.

243. When was execution against a debtor's property first applied?

244. Was appeal allowed in civil cases (1) under the Republic, (2) under the Empire?

LIST D. *September, 1925.*

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SUBJECT INDEX.

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